FIQH MUAMALAH

ISLAMIC BUSINESS TRANSACTION

CHAPTER ONE

INTRODUCTION TO FIQH & SHARIAH

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- Comparison Between Islamic Law And Man-made Law

- Before Muhammad s.a.w became Messenger of Allah, he was involved in business and trading – an experienced merchant with vast knowledge in trade.
- His first business exposure was when the prophet (s.a.w) was only 12 years old when he accompanied his uncle, Abu Talib in a trading caravan to Busra in Syam (Syria). This has actually been normal practice for the Quraisy tribe who are mostly professional traders.
- Prophet (s.a.w) actual involvement in business when he was 25 years old when he was invited by a wealthy and noble businesswoman named Khadijah Khuwailid to head her trade to Syam – to transport and sell merchandise from Makkah and import Syrian-made product and resell them back in Makkah.
- This offer was mainly based on positive characteristic that Muhammad (s.a.w) associated with like honesty, trustwothiness and nobility – and called Al-Amin.

- As capital provider, Khadijah would engage men in profit-sharing partnership for her international trading operation.
- By having them as part of company instead as a employee will instill sense of ownership and belonging of the employees. They will take extra care of the business that they share part of profit and loss.
- Being the owner of business and employer, she already gained experience in recruiting, managing, handling and possibly terminating the services of her employees – ensure the prosperity and longevity of her business.
- Khadijah recognize Muhammad (s.a.w) possessed all the attributes of a good employee, partner and entrepreneur and natural talent that would further consolidate and expand her business position.
- She presented him (s.a.w) business proposal to venture with her capital in a trade mission to Syam - and offered to pay twice to ensure his acceptance without any hesitation.
- Prophet (s.a.w) accept the deal since his uncle, Abu Talib was really poor at that time and need financial assistance.

- The decision was actually turning pint of her business and personal life. Muhammad (s.a.w) proved his mettle and quality of endurance and managed to gain huge amount of profit from the Syam venture – twice from Khadijah normally gained from other trade mission.
- Muhammad (s.a.w) and Khadijah eventually married and the business continued until Muhammad became Messenger of Allah fifteen years later.
- Despite being young and illiterate, Prophet Muhammad (s.a.w) was never a naïve trader. He (s.a.w) was really and excellent and skilled trader that could certainly grasp the real world situation and face challenge of local and international trade.
- By having accumulate 15 years of trading skills and experience until he (s.a.w) was 40 years old, Prophet (s.a.w) guidance (sunnah) in Muamalat should be highly regarded by traders and businessman.
- Besides being divinely revealed by Allah, the guidance and rulings came from a successful corporate figures who was able to understand the secrets of both the worldly affairs as well as the matters of hereafter life

FIQH

- Fiqh ( ) literally means to understand ( )
  - An example of this is found in the Qur'aan in the Dua of Prophet Musa (as) when he asked Allah to remove the impediment from his speech so Firaun and his people could understand him.
  - "And loosen the knot from my tongue. That they may understand my speech." Chapter 20 verses 27-28.
- Literal
  - the true understanding of what is intended
- Technical
  - The knowledge of the laws of the Shariah, relating to men's act and that have been derived from specific sources and evidences.

FIQH

- Technical
  - The knowledge of the laws of the Shariah, relating to men's act and that have been derived from specific sources and evidences.

Knowledge	•Includes every single field of knowledge whatever its sources or origin
Laws	•Excludes all kind of knowledge that do not pertain to rules (hukum)
Shariah	•Fiqh is confined to legal rules of man made laws, or rules based on rational, or those that are discoevered through experience
Acts	•Confine the definition to the knowledge of practical (amali) rules and not theritical. Excluded knowledge of rules with respect to belief and faith
Derived	•Confine fiqh to knowledge that are acquired and not knowledge that are revealed
Specific	•Excludes evidences of Shariah that are too general and not available for the purpose of practice. Excludes the acquired knowledge of the layman from the jurist
Sources	•Individual texts of whether the Holy Quran or Sunnah

FIQH

- Fiqh:
  - Product of legal reasoning (ijtihad) and deduction of the jurist and scholars from the specific sources of the Holy quran and Sunah
- Faqih
  - Jurist; a person expert in legal sciences and know how to derive ruling and judgement based on a detail and analysis of every single evidence in Islamic Law.

COMPONENTS OF FIQH

Ibadat	Adat (custom/ practice)
• Governs the relationship between man and god • Laws regulating ritual and religious observance	• Governs the relationship of men between themselves
Made up of obligatory and recommended 1. Obligatory (Wajib) ibadat such as Obligatory prayers 5 times a day, Zakat, Fasting in the month of Ramadhan and pilgrimage to Makkah 2. Recommended (mubah/ sunat) ibadat such as recommended prayers, donation. Charity, recommended fasting, umrah etc	1. Munakahat: Family law, law of marriage and divorce, law of inheritence 2. Muamalat: Commercial law, law of property and contract 3. Uqubat: Criminal law, penalties and procedures 4. Siyasah Syariyyah: Constitutional law and the administration of the state 5. International Law: Law on the relationship between government and nations

COMPARISON BETWEEN IBADAT AND MUAMALAT

SIRAH

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SOURCES

COMPARISON

IBADAT	MUAMALAT
• Original Rules: • Prohibition unless there is a clear evidence on its permissibility	• Original Rules: • Permissibility unless there is a clear evidence on its prohibition
• Any act of worship is forbidden unless there is evidence that validate its permissibility. Muslims can only perform devotion to Allah in the manner specified in the Quran and Sunnah	• Commercial transaction are formed on the principle if permissibility in accordance with legal maxim of fiqh
• Ibadat are quite standardized and fixed with very strict rules and regulations.	• Commercial transaction are quite flexible, changeable, temporary and varies according to the time, place, custom and condition (except for certain rulings)
• Devotional matter are made of guidance from the Quran and Sunnah and not from the needs of society	• To declare transaction valid, Muslim only need to investigate whether a clear, self-explanatory prohibition exists, and if none found, the transaction maybe presume to be valid
• Basic norm in Ibadat based on total submission and devotion to Allah	• Basic norm in muamalat is based on rational, effective cause and benefit
• The evidence of ibadat from the Quran and Sunnah are mostly specific and detail in nature	• The evidence of muamalat are mostly general and quite universal in nature

SHARIAH

- Sharia ( ) comes from the word ( ) which literally means to prescribe or ordain, law, and a straight road or path.
- Literal
  - The road to watering place; the straight path to be followed
- Technical
  - Rules which are ordained by Allah for His servants by sending His Messenger
- Refers to Islamic laws which were revealed to the Prophet Muhammad (saw) and which are recorded in the Quran and Sunnah

DISTINCTION BETWEEN SHARIAH AND FIQH

SIRAH

FIQH

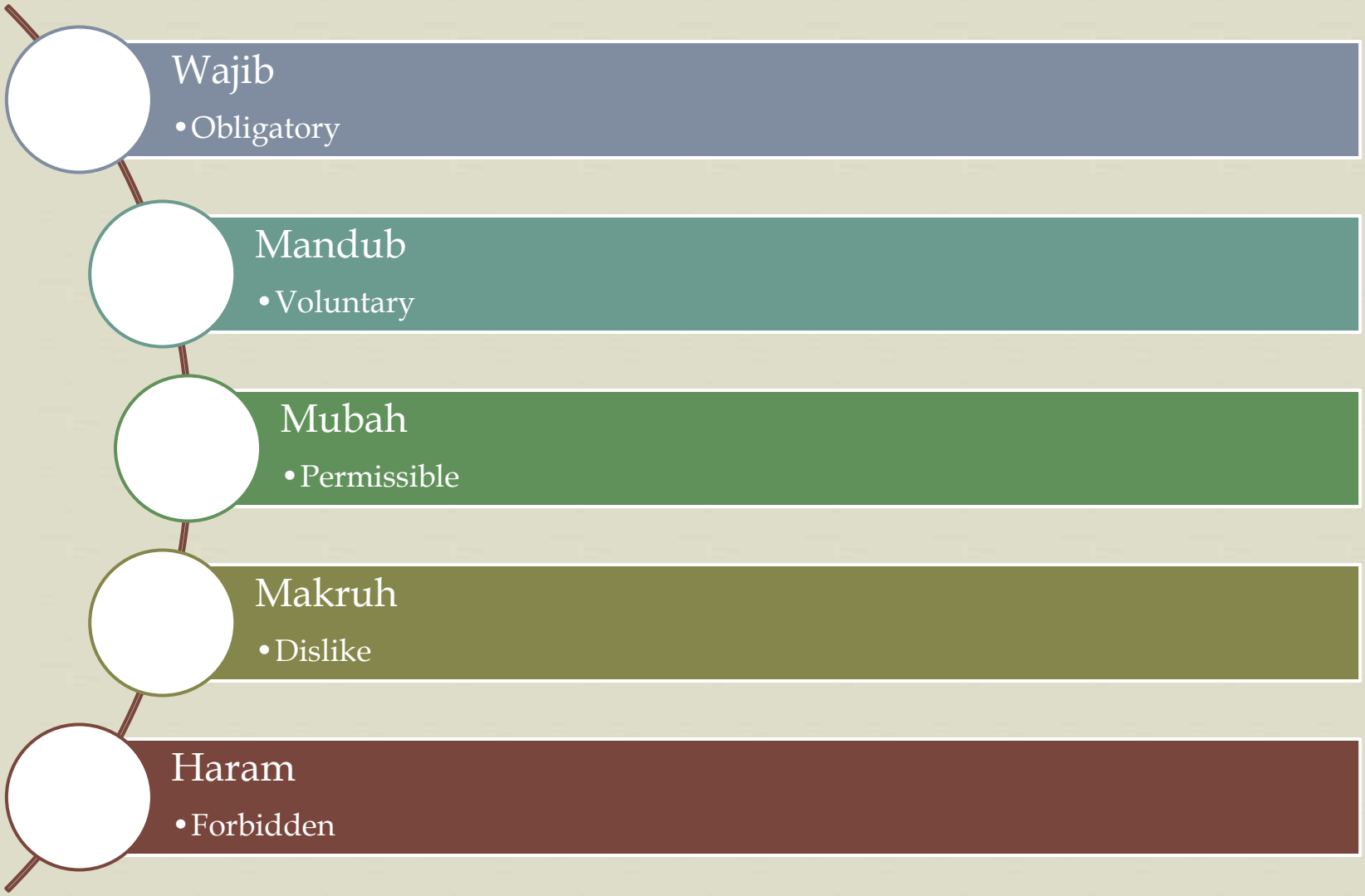
SHARIAH

SOURCES

COMPARISON

SHARIAH	FIQH
•A path leading to the source of a meaningful life (Islam) •God-given	•A product of understanding of the sources in Sharia •Humanly acquired
•Embrace all human beliefs, activities and actions	•Deals with legal rulings and acts
•Components: •Aqidah •Akhlaq •Ibadah •Muamalat	•Components: •Ibadah •Munakahat •Muamalat •Uqubat •International relations
•The body of revealed laws found both in the Quran and Sunnah	•A body of laws deduced from shariah to cover specific situation not directly treated in Shariah law
•Fixed, unchangeable and eternal	•Certain components are fixed while some others are subject to change according to the circumstances
•Most part are general	•Tend to be specific and detail
•Lay down basic principles	•Understanding and application of Sharia, how it should be applied

RULINGS RELATED TO SHARIAH



SOURCES OF ISLAMIC LAW

PRIMARY SOURCES

- Al-Quran
- Sunnah
- Ijma'
- Qiyas

SECONDARY SOURCES

- Istihsan (juristic preference of the stronger principles)
- Istishab(Presumption of continuity)
- Maslahah Mursalah (extended analogy/ consideration of public interest)
- Sadd al-Zarai' (blocking unlawful means to an unlawful end)

AL-QURAN

SIRAH

FIQH

SHARIAH

SOURCES

COMPARISON

- The fundamental and main sources of Islamic Law from which all other sources derive their authority
- It may be defined as:
  - The book containing the speech of Allah, revealed to Prophet Muhammad in Arabic and transmitted to us by continuous testimony, or tawatur.
- Consists of the word of Allah SWT revealed on Prophet Muhammad saw in 23 years – divine origin
- Address to all humanity, without distinction of race, region or time
- It seeks to guide human beings in all aspect of life

THE SUNNAH

- Sunnah
  - Literally: a way or rule or manner of acting
  - Technically: What has been (authentically) related to us on behalf of the Prophet from his sayings, actions, and tacit approvals.
- Hadith
  - Literally: communication, story, conversation
  - Technically: What was transmitted on the authority of the Prophet ,his deeds, sayings, and tacit approvals, or description of his sifaat (features).”
  - Both cover the same ground: practice, sayings and tacit approvals(taqrir)
- Quran generally deals with the broad principles or essential of religion. The details are supplied by Prophet saw through hadith

IJMA'

- Ijma' – Consensus of opinion among the jurist on certain issues and ruling
- Literally:
  - Ijma is the verbal noun of the Arabic word Ajma'a which has two meanings:
    - To determine
    - To agree upon something
- Technically
  - Consensus of mujtahids (jurist) from the ummah oh Muhammad (saw), after his death in a determined period upon a rule of Islamic law
- Consensus of opinion among the jurist of a particular period on a question of law
- Ijma' maybe based on Quran, hadith or analogy

QIYAS

- Qiyas – analogical deduction
- Literal
  - Measuring or estimating on thing in terms of another
- Technical
  - The extension of Shar'iah ruling from an original case (Asl) to a new case (far') because the new case has the same effective cause (Illah) as the original case.
- Qiyas or analogy is resorted to in respect of problems about which there is no specific provision in the Quran or the Sunnah of the Prophet
- Analogical deduction of new issues on existing evidence from the Quran and Sunnah
- Process by which a rule of law is deduced from original text in views of common effective cause (illah)

COMPARISON BETWEEN ISLAMIC LAW AND OTHER MAN-MADE LAWS

ISLAMIC LAW		MAN-MADE LAW
• Holy Quran and Sunnah	**Sources**	• Man-made legal system based on human tradition, customs, experiences or experiments, precedent rulings and cases • Oxford Dictionary defines laws as: rule established by authority or custom, regulating behaviour of members of community, country etc.
• Created by Allah SWT. • Consequently it embodies the attributes of its Creator both the Creator and its creation (law) are characterized by perfection, faultless and justice.	**Characteristics**	• Created by man • It embodies characteristic of its creator where both creator (mankind) and its creation (law) characterized by imperfection, deficiencies, flaws and shortcomings
• General principles and fundamentals remain fixed, preserved and not subject to change and alteration. • However, the branches and subdivision of laws formed on the needs of society is flexible and open to revision and adjustment	**Characteristics**	• Evolving in nature and open to alteration, modification and amendment • It is nearly impossible to reach perfection and completion • The principle of man-made law may change and be modified over time

COMPARISON BETWEEN ISLAMIC LAW AND OTHER MAN-MADE LAWS

ISLAMIC LAW		MAN-MADE LAW
• Its creation take precedence over the formation of the society. Represent a god-created law which governs the society but the principles are permanent, eternal unchangeable. • Covers present, past and future state of affairs	**Characteristics**	• Created and formed subsequent to the formation of the society. Represent man-made law which govern the society on a temporary basis and to fulfill their current needs. • Applicable only to certain time, place, conditions and society • Covers past and present, but not the future
• Extensive and comprehensive coverage of human conducts • Encompasses ritual and hereafter and also worldly activities	**Scope**	• Specific rules governing the social, economic and political affairs of nation • Devotional matter and rules of individual moral behaviour are not covered
	Classification	• Public law: Constitutional law and Criminal law • International law: Public international law and private international law • Private law: Law affecting rights and duties of individuals among themselves.
• Firmly establish, enduring, durable and everlasting in nature. Islamic law has indestructible feature of adaptability.	**Suitability**	• Only suitable for certain time, places, condition and circumstances

END OF CHAPTER

SIRAH

FIQH

SHARIAH

SOURCES

COMPARISON

QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

HISTORICAL DEVELOPMENT OF FIQH

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THE STAGES

FOUNDATION

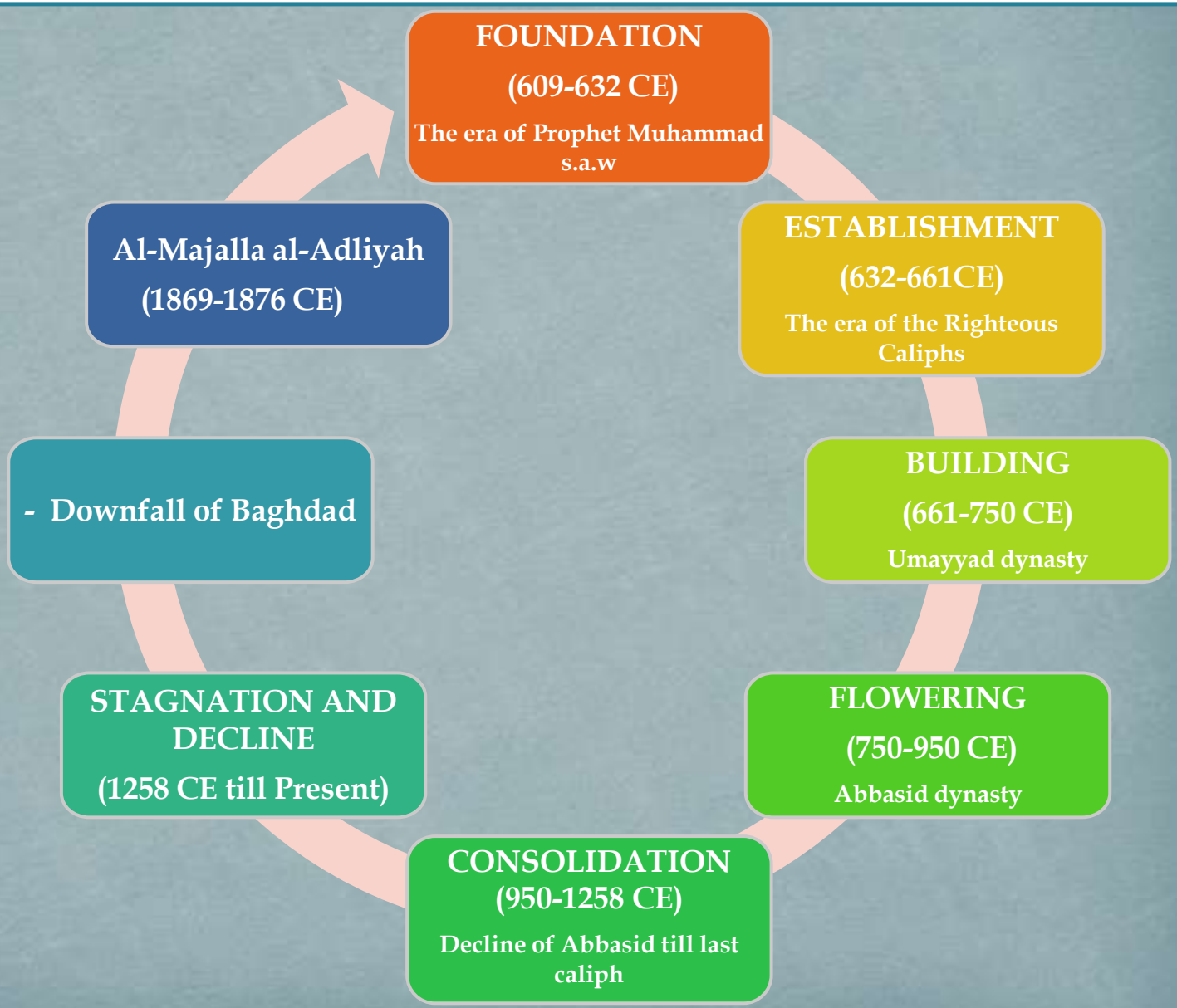
ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION



1st STAGE

FOUNDATION

OUTLINE

- INTRODUCTION
- METHOD OF LEGISLATION
- SOURCES
- BASIS

INTRODUCTION

FOUNDATION

ESTABLISHMENT

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STAGNATION

- The period of revelation in the era of the Prophet Muhammad took over a period of 23 years of his life (609-632 CE)
- The most important period as it lays down the foundations for all the development.
- Two period of legislation - Makkah and Madinah.

LEGISLATION IN MAKKAH

- Took almost 13 years in Makkah (609-622 CE).
- Focus on building the ideological foundation in Islam.
- Central topics of legislation
  - building the faith (iman)
  - inculcating good character and moral values.
- Among the important themes of the revelation:
  - Unity and existence of allah
  - Life after death
  - Heaven & hell
  - Stories of previous peoples
  - Challenges to the pagan of makkah
  - Moral values

LEGISLATION IN MADINAH

- From hijrah of the Prophet till his demise (632 CE)
- Islam began to spread among the arab and the non-arabs.
- The Prophet was appointed as the ruler of Madinah, a full fledged Islamic state.
- Central topics of legislation
  - Law and development of an islamic nation
  - Strengthened the foundations of iman and tawhid
- Among the important themes of the revelation:
  - Legal injuctions (al-ahkam al-amaliyah)
  - Peopleof the book (ahl al-kitab)
  - Jihad and rulings related to warfare
  - The hypocrites (munafiqs)
  - Moral and ethics related to social life

METHOD OF LEGISLATION

- Continuous revelation
- Direct answers to questions raised
- Cater to certain incidents
- Necessitates the society
- Reasons for gradual revelation
- Method not limited to public law but also individual law

METHOD OF LEGISLATION

- Continuous revelation
  - From the first revelation (Al-'Alaq) till near his death
  - The 1st revelation-Al-'Alaq
  - The last revelation-"Today I have perfected your religion for you and chose Islam as your religion …" (Al-Ma'idah:1)

METHOD OF LEGISLATION

- Direct answers to questions raised
  - Examples from revelation
  - Quran:
    - They ask you about fighting in forbidden months … a grave offence but blocking Allah's path and denying Him is even greater … Q 2:217
    - They ask you about wine and gambling … Q 2:219
    - They ask you about menses … harm so stay away Q 2:222

METHOD OF LEGISLATION

- Cater to certain incidents
  - To solve problems of that incident
  - Revelation from Quran :
    - Hilal ibn Umaiyyah - accused wife of adultery - Hadith : Either you bring proof or you will receive punishment - but saw man on top of wife i.e. no evidence - Revelation of 4 oath plus 5th to curse oneself (Q al-Nur,24 : 6-9)
  - From Sunnah:
    - Question from companion : sail sea … wudhu with sea water ? … Halal (Tirmizi, Nasa'i, Ibn Majah and Abu Daud)

METHOD OF LEGISLATION

FOUNDATION

ESTABLISHMENT

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CONSOLIDATION

STAGNATION

- Necessitates the society
  - Revelation without occurrence or questions
  - Examples:
    - Legislation related to the principle of syura (Ali-Imran: 159)
    - The different types of zakah items.
    - Kinds of penalty for crimes.

METHOD OF LEGISLATION

- Reasons for gradual revelation
  - Easier to be accepted - used to total freedom
  - Easier to learn & understand the law with reasons and content explained to them
- Method not limited to public law but also individual law
  - salah - early Makkah – 2x (morning & night) – 5x before migration with 2 rakaat except maghrib – after accustomed, number increased

SOURCES

Quran

- Outlining general principles
- Revelation
  - ..not from his desire .. Inspiration send (53:34)
- Continuous in nature

Sunnah

- Application of Quran to every day's life
- Explained through practices of Prophet Muhammad s.a.w
- Quran: ..revealed the Reminder .. Explain to mankind (al-Nahl:44)
- Hadith: Pray as you see me pray

GENERAL CONTENT OF QURAN

- The Makkan Period (609-622 CE)
- General content
  - Tawhid (unity of Allah)
    - Nothing new; already known
    - Associated with more
    - Oneness; no sharing
  - Allah's existence
    - Early verses with logical argument
  - The next life
    - No knowledge before
    - Wonders and punishment
  - The people of old
    - Ad, Thamud
    - Warning & good news
  - Salah
    - Related to tauhid
    - Legislated in Makkah
  - Challenges
    - Challenge to produce similar

GENERAL CONTENT OF QURAN

- The Madinan Period
- 622 – 632 CE
- General content of Holy Quran
  - Laws
    - Organization of states
      - Prohibition of gambling, adultery, etc
      - Punishment
    - Jihad
    - People of the Book
      - More contact with Jews
      - Answers on negative questions
    - The munafiq
      - Expose plots vs. insincere converts

BASIS OF LEGISLATION

FOUNDATION

ESTABLISHMENT

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STAGNATION

- Removal of Difficulty/ Hardship
- Reduction Of Religious Obligations
- The Realization Of Public Welfare
- The Realization Of Universal Justice

BASIS OF LEGISLATION

- Removal of Difficulty/ Hardship
  - System of Islam has been revealed for man's benefit
  - Islamic laws are not meant to be a burden-facilitate individual and societal needs
  - Examples:
    - ….commands to do righteous and prohibits from evil … HQ7:157
    - Business – no riba – unfair advantage
    - Divorce – oppressive
    - Alcohol – physical and mental damages

BASIS OF LEGISLATION

- Reduction Of Religious Obligations
  - Natural consequences of the previous principle relatively few
  - Prohibited acts in Islamic legislation are few in comparison to those which are allowed by direct command or by the absence of any command or prohibition
  - Prohibitions
    - Sub-categories are named and listed eg. Mahram, forbidden food etc
  - Permissible:
    - General precepts suitable for all circumstances eg. Fulfilling contract, permissibility of bay'
  - Example :
    - Prohibited to you are your mothers, your daughters …(4:23)..Except for those, all others are lawful … (4:24)
    - Fulfill contract (5:1), permissibility of bay' (2:275) etc.

BASIS OF LEGISLATION

- The Realization Of Public Welfare
  - Laws are primarily enacted for general good of mankind
  - Prophet sent for all people till the end of the world
    - "…I am messenger of Allah to all of you" (Q 7:158)
  - Naskh (abrogation) within Islamic legislation – Allah prescribe law suitable to people at the time of its enactment or to serve particular purpose
  - Example:
    - Bequest/ Law of inheritance (wasiyyah) (2:180)
    - Mourning period (eddah) – from one year to three quru' (2:240)
    - Punishment or Hudud for murder, theft, crime, zina etc.

Basis of Legislation

FOUNDATION

ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION

- The Realization Of Universal Justice
  - All humans are same in obligations to submit to divine law
  - No distinction between one group with another.
  - .. When judge between mankind, judge justly … (Q 4:58)

POSITION OF IJTIHAD ?

- Ijtihad-the process of arriving at reasoned decision to suit new circumstances.
- Practice of ijtihad by the Prophet & companions
- Hadis of Muaz b. Jabal
- Ijtihad
  - not considered as independent source of law as validity depend on divine revelation for confirmation.
  - Eg. The case of zihar between Khawlah and her husband.
- Prophet's ijtihad = essentially meant to give lesson to companion on method of ijtihad

POSITION OF IJTIHAD ?

- Companions' ijtihad - basically for practice.
- They were encouraged to do so as training-prepare them to carry on the application of shariah after his demise.
- Hadith:
  - "Whoever make ijtihad and is correct will receive two rewards.."
- Examples:
  - Two companions were on journey-find no water for wudhu'-tayammum-later found water-one of them repeat the solat-the prophet then said that there was no need to repeat the solat.

SUMMARY

- The foundation period marked the beginning of the evolution of fiqh as the science of deducing laws from the Qur'an and Sunnah were laid by the Prophet.
- Foundation of mazhab took shape as the Prophet guided and trained the companions in ijtihad.

The 2nd Stage

STAGE OF ESTABLISHMENT

OUTLINE

- THE PERIOD
- PROBLEM-SOLVING PROCEDURE OF THE RIGHTEOUS CALIPHS
- APPROACH OF INDIVIDUAL SAHABAH
- FACTORS OF UNITY
- CHARACTERS OF FIQH

THE PERIOD

- The era of the Righteous Caliph and major of sahabah
- From the era of Saidina Abu Bakar r.a. to the era of Saidina Ali r.a. (632 – 661CE)
- Expansion of Islam
  - Syria, Jordan, Egypt, Iraq, Persia
  - Faced new systems, culture, behavior – some specific provision was not found in the laws of Shariah
  - Relied on ijma and ijtihad - establishment of procedures for legislations by caliphs and later became the basis of legislation in Islam (fiqh)

PROBLEM-SOLVING PROCEDURE

- Procedures to solve new problem occurred during the period by Abu Bakar and Umar:
- Quran
  - Any specific ruling on the problem?
- Sunnah
  - If no answer, search in the sayings and actions of Prophet saw
- Ijma
  - If no answer, set up meeting
  - Call major sahabah for the formal meeting
  - Try to get unanimous agreement on solution
  - If unanimity could not be arrived, take the postion of the majority.

IJTIHAD

- Companions were trained by Prophet during his lifetime to exercise ijtihad in resolving the issues of fiqh
- During this period, some fuqaha among companions execise ijtihad
- People also approached sahabah for day-to-day ruling
- Some were actively involved in resolving issues eg Umar al-Khattab, Ali ibn Abi Talib and Abdullah ibn Masood etc
- Have different approach in understanding the text – stick to literal meaning or find rationale of the injunction
- Differences of views:
  - Great differences; cannot get majority view
  - Personal opinion or ijtihad became the law
  - Right to overrule consensus
  - New places = new rulings = developed proper procedure with minimum disagreement

INDIVIDUAL IJTIHAD of SAHABAH

1. Warning
   - That ruling might not be as Allah intended
   - Eg : Ibn Mas'ud – Asked on inheritance rights of married woman – " … giving my opinion. If it is correct, then it is from Allah, but if it is incorrect, then it is from me and satan"
2. Drop differences
   - Gave a ruling, later found authentic sunnah, drop the differences
   - Eg : Place for burial of prophet saw – different opinion - S. Abu Bakar heard from prophet saw – " … buried at place where they died…" grave beneath his bed in Aishah's house
3. No force if no proof
   - Cannot find authentic proof or unanimity
   - Respect each other's opinion
   - No force for others to accept
   - Force only if later found people following practices formerly acceptable but was later prohibited
     - E.g.:Mut'ah – Formerly allowed – Unknown sahabah still practiced – Prohibition by Umar

REASON FOR DIFFERENT OF OPINION AMONG COMPANIONS

- Difference in their knowledge of the existence of a particular Hadth of the Prophet in the issues of fiqh
- Difference in their acceptance of Hadith
- Difference in the interpretation and understanding of the Quranic text
- Difference in the method of ijtihadon issues not mentioned in the text

CHARACTERISTICS OF FIQH

1. Real issues of fiqh
   - Based on actual problem; not hypothethical or imaginary issues
   - This mater develop and resulted the formation of school of hadith
2. Not rigid with law-making procedure
   - No prescription of procedure to be followed in resolving issues of fiqh
   - Respect for freedom of opinion
   - Not much differences to result in any factionalism
3. Usage of personal opinion
   - Majority stick close to literal meaning of the Quran and Sunnah
   - Some preferred personal opinion in undefined area

CHARACTERISTICS OF FIQH

4. Modification of law
   - Reasons for modification :
     - Disappearance of the reason for law's existence
       - Prohibition by Umar in giving cash from baitulmal to new converts
       - Previously, supporters were needed; now, no need for that extent
     - Change in social condition
       - Pronouncement of 3 lafaz of talak at one same time ; now, binding and not reversible
5. No specific mazhab
   - Directly linked to state
   - Mazhab of each caliph is the caliph himself; had last word over hukum

The 3rd Stage

BUILDING

OUTLINE

- THE PERIOD
- FACTORS AFFECTING FIQH
- CHARACTERISTICS OF FIQH
- REASONS FOR DIFFERENCES
- COMPILATION

THE PERIOD

- Covers rise and fall of Umayyad dynasty - in power for 1 century
- From the time of the founder Muawiyah until last caliph around mid 8th century (661 – 750)
- Marked by social unrest:
  - Ummah divided into various sects and groups
  - Caliphate was converted to Kingship = hereditary
  - New practices were introduced - some were haram
  - Ulamak vs umara' –ulama' fled away
- Trend regarding Islamic law
  - More ijtihad & less ijma
  - Widespread of hadith = tendency towards fabrication
  - Compilation of fiqh – to preserve ijtihad of sahabah
  - Clear-cut division of ulama – establishing mazhabs

FACTORS AFFECTING FIQH

- Division Of Ummah
- Deviation Of Umayyad Caliphs
- Dispersion Of Ulama
- Fabrication Of Hadith

FACTORS AFFECTING FIQH

1. Division of the ummah
   - Socio-political chaos leading to division among ummah
   - Numbers of sects and factions appear.
   - Rebellion of Khawarih, Shiah, and Abdullah ibn az-Zubayr and followers. Khawarij & Shi'ah
     - Later evolved into more sects through their own systems of fiqh
     - Had own way of interpretation to suit their social condition
     - Rejection of most of sahabah/caliphs
     - Came up with their own experts

FACTORS AFFECTING FIQH

2. Deviation of Umayyad Caliphs
   - Introduced practices which were common in non-Islamic states like Byzantium, Persia & India
   - Many contradicted with Islamic practices
     - Baitulmal became personal property of caliphs
     - Introduced taxes not sanctioned by Islam-to increase their fortune
     - Entertainment in court-music, dancing girls, magician etc
   - Hereditary of kingship (Muawiyah to son Yazid)
   - Scholars avoided caliphs = loss Shura practice
   - Each successor = stronger dictatorial monarchy
   - Rulers manipulated fiqh = to justify their actions
   - Collection & compilation of earlier period fiqh by scholars to counter distortion & preserve authentic fiqh

FACTORS AFFECTING FIQH

3. Dispersion of Ulama
   - Scholars fled away from political centre
     - To avoid conflict and confusion
     - To avoid persecution by competing factions
   - Resulted in break-down of ijma'-scattered scholars caused unanimity to be impossible to establish
   - Led to increase in ijtihad to tackle problems in their areas
   - Evolution of mazhab
     - Outstanding figure attracted others to his region to learn from him
     - E.g. : Abu Hanifah & Sufian ath-Thauri in Kufah

FACTORS AFFECTING FIQH

4. Fabrication of Hadith
   - More narration of hadith as need for information grew
   - Scholars had to search for individual narration handed down by sahabah to make legal judgment
   - False sayings and actions of prophet started to spread out; fabricator convey fabrication along with some true hadith to be trusted-mixture of true and false report-incorrect fiqh evolved
   - Led to compilation of hadith and development of science of hadith

CHARACTERISTICS OF FIQH

- Division of 2 major groups
- 1st group : Ahl al-Hadeeth
  - Limit reasoning
  - If clear text is available, avoided legal rulings
  - Do not follow what you have no knowledge of (17:36)
  - Analogical deduction = arriving at answer by logical reasoning based on similarities
  - Centre = Madinah
  - Fiqh of Madinah based on real problems

CHARACTERISTICS OF FIQH

- 2nd group : Ahl ar-Ra'i
  - Usage of power of reasoning to arrive at possible reasons (where no reasoning given)
  - Applied law to other circumstances
  - Followed approach of sahabah – deduced reasons for some divine laws
  - Centre = Kufah (Iraq)
  - Fiqh of Kuffah developed along hypothetical questions
    - imaginary situations
    - what ifs (what-iffers)

DIFFERENCES

Ahl al-Hadith

- Limit their deductions to available text
- Laws whose purposes were identified were used in analogical deductions
- Center - Madinah
- Fiqh - practical and based on real problems

Ahl al-Ra'yi

- Extensive use of deductive reasoning and ijtihad
- All laws revealed had identifiable reasons -
  - applied to other circumstances which had similar causes
- Center - Kufah, Iraq
- Developed hypothetical fiqh (What-iffers)

REASONS FOR DIFFERENCES

- Political factors combined with differing social background
- Different socio-cultural background – more complex lifestyle when capital of Islamic state shifted from Madinah to Iraq then Syria. People of Hijjaz (Makkah and Madinah) had a simple life – not many issues arisen.
- Another reason – Great number of hadith available to the people of Madinah and the rulings of the righteous caliphs.

REASONS FOR DIFFERENCES

Ahl al-Hadith

- Hijaz was spared much of the turbulance and influx of foreign cultures and ideas
- Life in Hijaz was easy-going and simple
- Abundance of hadith and legal rulings made by the 1st three caliphs

Ahl al-Ra'yi

- New and dtrange land for Muslims
- Iraq became melting pot of various cultures
- A few hadith because the number of sahabah who settled there was small
- Birth place of fabricated hadith and deviant sects
- Hadiths were only accepted after the fulfilment of very strict condition

COMPILATION OF FIQH

- Not much during the previous - 1st attempt to compile legal rules
- So there was a need to preserve previous rulings @ contribution of sahabah
- Compilation made by:
  - Hijaz scholars
    - Abdullah ibn Abbas
    - Abdullah ibn Umar
    - Aishah bt Abu Bakr
  - Iraq scholars
    - Abdullah ibn Mas'ud, Saidina Ali

COMPILATION OF FIQH

- Era of Righteous Caliphs
  - No compilation of rulings made by them and sahabah
  - More concentration on running of state as state was expanding
  - Just started to guide the young Muslim nation.
  - No opportunity for compilation of previous rulings n opinions
  - Sahabah viewed their ruling as not binding on everyone, time and place–merely opinions

COMPILATION OF FIQH

- Umayyad period
  - 1st attempt to compile legal rules
  - Change of structure of government (from caliphate to monarchy) = more rulings against sahabah's
  - So there was a need to preserve previous rulings @ contribution of sahabah
  - Collections made by:
    - Hijaz scholars the rulings of:
      - Abdullah ibn Abbas
      - Abdullah ibn Umar
      - Aishah bt Abu Bakr
    - Iraq scholars the rulings of:
      - Abdullah ibn Mas'ud, Saidina Ali

COMPILATION OF FIQH

- Unfortunately, none survived in their original form
- The early compilation are only quoted as references by next generation scholars in their writings or books.
- However, a large number of previous rulings are preserved by the way of hadith narration, history books and fiqh books

THE 4TH STAGE

FLOWERING

OUTLINE

- PERIOD
- DEVELOPMENT OF FIQH
- SCHOLARS
- SOURCES OF LAW

FOUNDATION

ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION

PERIOD

- Started from the beginning of the 2nd century of Hijrah in the year 750 CE with the rise of Abbasid Dynasty fiunded by Caliph Abu Abbas and ended in the middle of 4th century of hijrah (950 CE)
- Known as the era of independent reasoning
- Period of Abassid:
  - Flowering (2nd – 4th H/ 8th – 10th M) and Consolidation (4th – 7th H/ 10th – 13th M)
  - Covers period of rise, consolidation and early declination
  - Shifted from Damascus to Baghdad
- Major developments – leading to the emergence of the legal schools (Hanafi, Maliki, Shafii, and Hanbali)
- Strong support from caliphs in Islamic scholarship, discussion and debate on various issues.
- Golden age of :
  - Arabic literature: Poetry, writings; from theology and law to history and the natural sciences

DEVELOPMENT OF FIQH

- Fiqh was divided into sections:
  - Fundamental principles
  - Theological works (furu')
- Sources of Islamic law were also identified
- Two trend of mazhab
  1. Early part of dynasty @ 1st generation (750-850 CE)
     - Under guidance of founders @ the great imams
     - Flexible with exchange of ideas
  2. 2nd part (850-950 CE)
     - Under 2nd generation
     - Death of founders and major scholars
     - Rigid
     - Accept rulings prescribed

FACTORS CONTRIBUTING TO THE DEVELOPMENT OF FIQH

1ST Generation (750-850 CE)

- State support for scholars
- Increase number of learning centers
- Flourishing of debate and discussion

2ND Generation(850-950 CE)

- Compilation Of Fiqh
- Court Debates
- Compilation Of Hadith

FACTOR 1 : State Support For Scholars

- Early Abbasid Caliph showed great respect for Islamic laws and scholars.
- Secured power through claim to bring back to shariah
- Rulers and family members went to study under the great scholars (including caliph)
  - E.g. Caliph Harun Ar-Rashid
- Consulted scholars in most matters of fiqh
  - E.g. Caliph Mansur consulted Imam Malik to compile book of sunnah – wanted to turn it into constitution – the Imam refused – why? The hadiths used were those available in Hijjaz's – should make it binding-example of flexiblity
- Though scholars have freedom of opinion-should only support caliphs' policies
  - If ruling against caliph's policy = subject to punishment
    - E.g. Issues on automatic divorce from their wives if they broke their oath of allegiance to the caliphs, Imam Malik ruled out that divorce under such compulsion = null & void
    - He was jailed and tortured – fatwa challenged policy

FACTOR 2 : Increase In Learning Centers

- Expanded territories
  - Include Persia, India and Southern Russia
  - So, centers of learning multiplied
- Search for knowledge = journey between centers
  - Eg Imam Shafiee
    - to Hijjaz (study under Imam Malik)
    - Iraq (under Muhammad ibn al-Hasan)
    - Egypt (Imam al-Layth ibn Sa'd)
  - Result of such journeys
    - Reconciliation of some major differences
    - Combination of some schools of legal thought
      - Imam Shafiee combined Fiqh of Hijjaz with Iraq & Egypt
      - Flexibility

FACTOR 3 : Flourishing Of Debate And Discussion

- Emergence of prominent mujtahidun
  - Many prominent mujtahidun emerged and develop different science of Islam.
  - Foundation of major school of fiqh
- Debates and discussion
  - Prominent scholars created environment of discussion and academic debate
  - Exchange thoughts on Islamic issues during meetings/journeys
  - Differences leading to legal debates until common conclusion was reached or various option were accepted
  - Clarification of important issues and to clear out mistaken rulings
  - Did not result in the clarification of certain important issues and the weeding out of mistakes rulings
- Lack of rigidity or dogmatism; flexibility and free exchange of ideas
- Issue = objectively analyzed – get valid proofs – conclusion on the basis of validity of the available proofs were presented
- Willingness to change
  - opposite with later practice

FACTOR 4: Compilation Of Fiqh

- Search/hunt for hadiths and athars by previous scholars to arrive at a rulings
- In this period, sunnah were systematically organized & compiled
- Hence, 2nd generation were free to concentrate on comprehension and application of hadith
- Personal compilation of scholars
  - Imam Malik : Muwatta (hadis, opinion, personal ruling)
  - Imam Shafie : Al-Umm (personal rulings with proofs)
- Types of compilation
  - Mixture of rulings
  - Basic principles of fiqh
  - Application
- Compilation with proofs & chain of narration
- Trend = heavy reliance of mazhab ruling more than sunnah

FACTOR 5 : Court Debates

- Held for the interest & amusement of caliphs
- Competed among the scholars for the favor of the caliphs-create issue solely for the purpose of debate
- Hypothetical fiqh took new dimension: from inspiring origin to the ridiculous product of court debates
- Court debate: generate competitiveness & dogmatism-loser lost monetary rewards and personal prestige.
- Virtue if defending a mazhab-mazhab sectarianism become rampant among the court scholars.

FACTOR 6 : Compilation Of Sunnah

- Specialist in hadith-opposed the trend of slavishly following rulings of prominent scholars-maintain flexibility of the earlier scholars
- Refer on authentic hadith rather than following earlier rulings merely because they had been developed by prominent scholars
- Eg: Imam Bukhari and Imam Muslim (students of Imam Hambali) painstakingly collected authentic hadiths-arranged them in chapters

SOURCES OF LAW

- Divided into 2 types:
  - Agreed sources
  - Sources in which the scholars differed in terms of their utilization.
- Agreed sources are:
  - Al Quran
  - Sunnah
  - Ijma'
  - Qiyas
- Disputable sources:
  - Istihsan (juristic preference)
  - Al-masalih al-mursalah (consideration of public interest)
  - Al-istishab (presumption of continuity)
  - Sadd al-zarai' (blocking the means)
  - 'Urf (customs)
  - 'Amal ahl-madinah. (practice of madinah people)

THE 5TH STAGE

Consolidation

OUTLINE

- THE PERIOD
- FOUR MAZHABS
- EMERGENCE OF TAQLID
- REASON FOR TAQLID
- COMPILATION OF FIQH

THE PERIOD

- Covers the period between 950 CE and the sacking of Baghdad by the Mongols (1258 CE)
- Saw the declining of Abbasid Dynasty until its eventual collapse
- Known as Period of Taqlid
- Competitive debates called munazarat continued to flourish, some of the debates were recorded in books
- Mazhab factionalism became widespread
- Drastic reduction in the number of mazhab
- The structure and operation of the mazhab became highly systematized
- Scholars within a mazhab were obliged to base their ijtihad solely on the fundamental principles of their particular mazhab

FOUR MAZHABS

- The number of major mazhab dwindled to four (Hanafi, Maliki, Syafi'e and Hanbali)
- Other mazhabs dissapeared
- These 4 mazhabs became predominant
- The structure and operation of mazhabs became highly systematic and the scholars within the mazhab obliged to base their ijtihad solely on the fundamental principles of particular mazhab
- Each mazhabs took on a dynamism of its own and their followers started the practice of naming themselves after their respective mazhabs e.g Husain b. Mas'ud al-Baghawi al-Syafi'i

FOUR MAZHABS

- The scholars of each mazhab :
  - Analysed all the rulings of their mazhab's founding scholars
  - Deduced the fundamental principles behind their rulings and codified them
  - Made limited ijtihads on issues which the founders had not come across
  - Their ijtihads were made based on the deduction of laws for new issues according to the principles laid down by the founder of mazhab (ijtihad mazhabi)
- 2 principles used by the scholars of the mazhabs :
  - Tarjih
  - Tashih

EMERGENCE OF TAQLID

- Scholars left all forms of ijtihad - issued a legal ruling which was intended to close the door of ijtihad permanently
- New concept arose – one of the four mazhab had to be followed
- Taqlid is blind following of a particular view without knowledge of the basis of the view.
- Transferring to another mazhab was liable to punishment
- Prohibiting the marriage of a Hanafi to a Shafi'e
- Building separate prayer niches in the mosques

REASONS FOR TAQLID

1. The crumbling of the Abbasid empire into mini-states was accompanied by each state following the mazhab of its choice
2. The schools of fiqh were completely formed and the minutest of details worked out
3. Some unqualified individuals began to claim the right to make ijtihad in order to twist the religion to suit their wishes
4. The tendency of utilizing the view of a single mazhab by the judges has contributed in the spreading of taqlid

COMPILATION OF FIQH

- A format for writing fiqh books evolved and became standard
- Various issues were grouped under main headings and the main headings under chapters, which represented a major topic from syariah
- Iman – Taharah – Solat – Sawm – Zakat – Haj – Nikah & Talaq – Bay' – Adab

COMPILATION OF FIQH

- In dealing with any issue, an author from any mazhab :
  - Would mention the different proofs used by all of the mazhabs
  - Would end by methodically proving the correctness of his own's mazhab position
  - Refuting the arguments of the other mazhabs

THE 6TH STAGE

STAGNATION AND REINVENTION

OUTLINE

- THE PERIOD
- COMPILATION OF FIQH
- CODIFICATION OF FIQH
- PRESENT STATE IF ISLAMIC LAW
- REFORMERS

FOUNDATION

ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION

THE PERIOD

- Covers approximately six centuries starting with the sacking of Baghdad in 1258 CE and ending around the middle of the 19th century
- The period include the rise of Ottoman empire in 1299 CE until its decline under attack by European colonialism
- Prevailing characteristic :
  - Taqlid and factionalism
  - Dropping of all forms of ijtihad
  - Compilation of fiqh was limited to commenting on previous works
  - Dynamism of fiqh was lost, many of laws became outmoded and inapplicable
- Islamic law was supplanted by European laws
- Certain reformers sought to stem the tide of stagnation and decline

COMPILATION OF FIQH

FOUNDATION

ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION

- Some scholars show their efforts to exercise jihad and tried to reemphasize its importance and rejected ideas of solely referring all matters of Islamic law to the four prominent mazhab.
- The fiqh books of earlier scholars were condensed and abridgements of them were made – later scholars began to write explanations of summaries and poems – commentaries and footnotes
- Some books of usul fiqh and comparative fiqh were written
- The codification of Islamic law which prepared under Ottoman caliphs called Majallah al-Ahkam al-'Adliyyah (1876 CE), which was drafted by a panel of seven top ranking scholars of fiqh.

COMPILATION OF FIQH

- Colinization of Muslim states by western power has drastically affected the development of Islamic law.
- Muslim East Asia states were absorbed by European imperialism – the defeat of the Ottoman by Russia – total dissolution of the Ottoman Empire during the 1st world war

- European law codes replaced Islamic laws throughout the Muslim world

COMPILATION OF FIQH

- After the European colonialism ended, Islamic law has remained in disuse
- Exception :
  - Saudi Arabia (Hanbali)
  - Pakistan (Hanafi)
  - Sudan
  - Iran (Ja'fari)
- These countries had codified Islamic law in accordance to their mazhab.

CODIFICATION OF FIQH

FOUNDATION

ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION

1. Summary of different topics of fiqh
   - Scholars summarize different topics of fiqh and compiled them as a book called Al-Mutun. It is normally very brief and compact – need futher explanation to be fully understood
   - Scholars will then write explanation for the mutun in this Shuruh.
   - The shuruh is followed by another explanation of certain word called al-Hawashi
2. Compilation of legal verdicts
   - Compilation of legal verdics (fatawa) by the scholars.
   - This fatwa usually issued as an answer to the fiqh question
   - The scholar who issue the fatwa compile the fatwa according to different topics of fiqh
3. Codification of Majallah al-Ahkam al-Adliyyah
   - The 1st codification of Islamic law as a legal text
   - Most of the enactment in the Majallah favors the Hanafi views as all the scholars on the committee that were trusted to draft this code were from the Hanafi mazhab

REFORMERS

FOUNDATION

ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION

- Ahmad ibn Taimiyyah
- Muhammad ibn Ali al-Syaukani
- Shah Waliyullah al-Dihlawi
- Jamaluddin al-Afghani
- Muhammad Abduh
- Muhammad Rasyid Ridha
- Hasan al-Banna
- Sayyid Abul A'la al-Maududi
- Nasiruddin al-Albani

PRESENT STATE OF ISLAMIC LAW

1. Islamic law is developing from time to time – but not given due recognition as it is not fully implemented particularly after the fall of Ottoman
2. Fatawa and verdict on contemporary issues normally under the purview of several fiqh academy in the Muslim world – Islamic Research Academy (Majma' al-Buuth al-Islamiyyah) founded by Al-Azhar University of Egypt in 1961 and World Fiqh Academy under Organization of Islamic Conference (OIC) founded in 1981
3. Most Muslims countries has specific body responsible to issue fatawa pertaining to problem of fiqh in their respected countries – Dar al-Ifta' and Majlis Fatwa Kebangsaan

PRESENT STATE OF ISLAMIC LAW

4. Challenges faces by these different bodies to implement fatawa issued by them – Most countries separate legislative and the ifta' body. Therefore any resolution passed in the ifta' has to go through legislative body in order to be enforce as law
5. A concerted effort has to be made to make Islamic law to play major role in Islamic country. Political will and competence of the scholars has to molded together in order to make shariah a reality in Malaysia.

END OF CHAPTER

FOUNDATION

ESTABLISHMENT

BUILDING

FLOWERING

CONSOLIDATION

STAGNATION

QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

INTRODUCTION TO QAWAID FIQHIYYAH

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CONTENT

- INTRODUCTION TO QAWAID FIQHIYYAH
- DEFINITION OF TERMS
- DIFFERENCES BETWEEN THE TERMS
  - SHARIAH AND FIQH
  - FIQH AND USUL FIQH
  - USUL FIQH AND QAWAID FIQHIYYAH
- IMPORTANCE OF LEARNING QAWAID FIQHIYYAH
- SOURCES OF QAWAID FIQHIYYAH
  - AL-QURAN
  - AL-SUNNAH
  - AL-IJMA'
  - IJTIHAD
- MAQASID AL-SYARIYYAH

INTRODUCTION

- Qawaid fiqhiyyah or Legal maxims are general rules which can be applied in various cases that come under common rulings.
- Plays great role in the formation of Islamic law because they are uses as principles to deduce rules of fiqh
- According to al-Qarafi. Islamic law can be divided into two parts:
  - Fundamental matters (Usul)
    - Usul Fiqh
    - Qawaid Fiqhiyyah
  - Branches (Furu')

DEFINITION

- Literal meaning :
  - Qawa'id - plural of al-qa'idah, means general principles
- Fiqh means Islamic law
- Generally, Qawaid Fiqhiyyah means the principles of fiqh (Islamic law) which can be applied in different fields of fiqh that come under the common rulings
- Most principles of QF consist of a few words but provide comprehensive meaning

DEFINITION

- Technical meaning:
  - General rules which applied to all its particulars. It based on the idea that , if detailed rules stem from similar causes, it follows the common generally applicable principles or maxims.
- Mustafa al-Zarqa:
  - General fiqh principles which are presented in a simple format consisting of the general rules of syariah in a particular field related to it

CONCEPT AND SCOPE

- Hashim Kamali:
  - Legal maxims are theoretical abstractions, often in a few words that are expressive of the maqasid al-shari'ah.
- Consists mainly of statements of principles derived from the rules of fiqh on various themes.
- Represent the culmination of cumulative progress- not expected to take place at the formative stages of fiqh development

CONCEPT AND SCOPE

- They were developed gradually-their history is parallel with that of fiqh.
- Designed primarily for the better understanding of their subject matter rather than for enforcement.
- Thus judge cannot base his judgment on a particular maxim unless it is derived from the Qur'an or Sunnah or supported by evidence.

CONCEPT AND SCOPE

- Legal maxims are indeed general rules of fiqh, which can be applied in various cases that come under the common rulings eg. transactions, munakahat, evidence etc
- Have a great role in the formation of Islamic law because they are used as guidelines in finding the rules of fiqh but cannot be accepted as sources of shariah.
- These maxims have solved most of the minor rules of fiqh and without them these minor rules will have no standing ground which will make it hard to solve them

INTRODUCTION TO MAXIMS

- Maxim
  - General rule which applies to all its particulars
- Al-Shatibi
  - Eternal maxims … Pillars ... Human interests rests on them …
- Historical background – From the time before Islam through Aristotle, Justinian, etc – later French and English
  - He who comes to equity must come with clean hands

CHARACTERISTICS OF LEGAL MAXIMS

- Legal maxims (qawaid al-fiqhiyyah al-kuliyyah) are theoretical abstractions
- Usually in the form of short epithetical statements
- An established principle
- Expressive, often in a few words, of the goals and objectives of the shari'ah
- Statements of principles that are derived from the detailed reading of the rules of fiqh on various themes
- General in nature so that can be applicable to many different areas and situations

SOME CHARACTERISTICS

- Actual wordings of the maxims are occasionally taken from the qur'an or ahadith - often the refined work of leading jurists and mujtahids
- According to The Mejelle, legal maxims are:
  - Designed to facilitate a better understanding of the shari'ah
  - Judge may not base his judgment on them
  - Unless the maxim in question is derived from the Qur'an or Hadith or supported by other evidence
- Maxims of fiqh to be significantly conducive to ijtihad, may be utilized by mujtahid and judge as persuasive evidence.

FUNCTIONS

- Functions :
  - QF as a guidance /source
  - QF as a tool towards understanding problem/issues
  - QF as a code of law

IMPORTANCE OF LEARNING QF

- To know how the previous scholars solved problems in their life and formed the general rules in fiqh al-islam which covered all various chapters.
- To solve new problems in the society including cases of property, banking and food industry using the related maxims.
- To prove Islam is a progressive religion and can provide solutions to the new cases that occur in the society.

ORIGIN AND LITERATURE OF QF

- The first formulate legal maxims is the Hanafi jurist
- Develop gradually and hostory of their development in a general sense is parallel with the fiqh himself
- Develop mainly during the era of imitation (taqlid), in the nature of extraction (takhrij) of guidelines from the detailed literature of fiqh that were contributed during the first three centuries of Islamic scholarship, known as the era of ijtihad.

ORIGIN AND LITERATURE OF QF

- The works on QF can be traced back as early as the third century of Hijrah and continues up to the present.
- Compilations of maxims by Abu Tahir al-Dabbas which consists 17 maxims gathered from the Hanafi school.
- Earliest compilation in the form of a note of these maxims was written by Abu al-Hasan al-Karkhi.
- Abu Zayd Abdullah b. Umar al-Dabbusi (Ta'sis al-Nazar) - elaborate some of important maxims.

ORIGIN AND LITERATURE OF QF

- QF was not written all at once by a particular scholar, but was developed by the jurists at the time of the resurgence of fiqh.
- Earliest jurists who developed most of the maxim - jurists of the Hanafi school.
- As for the author of these maxims, most of them are not known except for those maxims originally deduced from the saying of the Prophet, or is attributed to a particular scholars.

FIVE MAJOR MAXIMS

- Acts Are Judged By The Intention Behind Them
- Certainty Is Not Dispelled By Doubt
- Hardship Begets Facility
- Harm Must Be Removed
- Custom Is The Basis Of Judgement

TYPES OF LEGAL MAXIMS

Maxims which are reiterated from a particular text of the Qur'an or Sunnah

Carry greater authority

- Examples:
  - Al-masyaqqah tajlib al-taysir
  - Al-'umuru bi maqasidiha
  - Al-dhararu Yuzal

Maxims which are formulated by the jurists.

- Examples:
  - Al-yaqin la yuzalu bi al-syakk
  - Dar al-mafasid awla min jalb al-manafi' ("Warding off detriments takes priority over the acquisition of benefits")

CLASSICAL LITERATURE

- Takhrij al-Furu' ala al-Usul
- Anwar al-Buruq fi Anwa' al-Furuq
- Al-Asybah wa al-Naza'ir (Jalaluddin al-Suyuti)
- Al-Asybah wa al-Naza'ir (Ibn Nujaym)

MAJALLAH AL-AHKAM AL-'ADLIYYAH

- The Majelle
- Produced in the year 1285H by the Ottoman government
- 1st codification of Islamic law
- There are 99 principles of fiqh mentioned in article 2 to article 100 in this set of law
- Most of these principles are taken from the collection of Ibn Nujaym and some from other collection

MODERN LITERATURE

- Al-Madkhal al-Fiqhi al-'Amm
- Al-Wajiz fi 'Iidah Qawa'id Fiqh al-Kulliyyah
- Al-Qawa'id al-Fiqhiyyah Nash'atuha wa Tatawwuruha Dirasat Muallifatiha
- Al-Nazariyyah al-Fiqhiyyah

THE DIFFERENT CLASSIFICATION OF QF

1. **The scope of the qawaid in term of its application towards the issues of fiqh**
   i. The major maxims that cover various issues of fiqh
      - 5 maxims
   ii. Maxim that covers substantial amount of fiqh subjects but the coverage is lesser
      - It is either extension maxims or maxims that is not related to the major maxim
2. **The acceptance of a particular maxim among the different schools of islamic law**
   i. Maxim which is accepted and utilized by all scholars of islamic law from different mazhab
      - 5 maxims
   ii. Maxim that is accepted by certain scholars from certain mazhab and rejected by others
      - Known as qawaid al-mazhabiyyah

DIFFERENCES OF TERM

Comparing Qawaid Fiqhiyyah with Shari'ah, Fiqh and Usul Fiqh

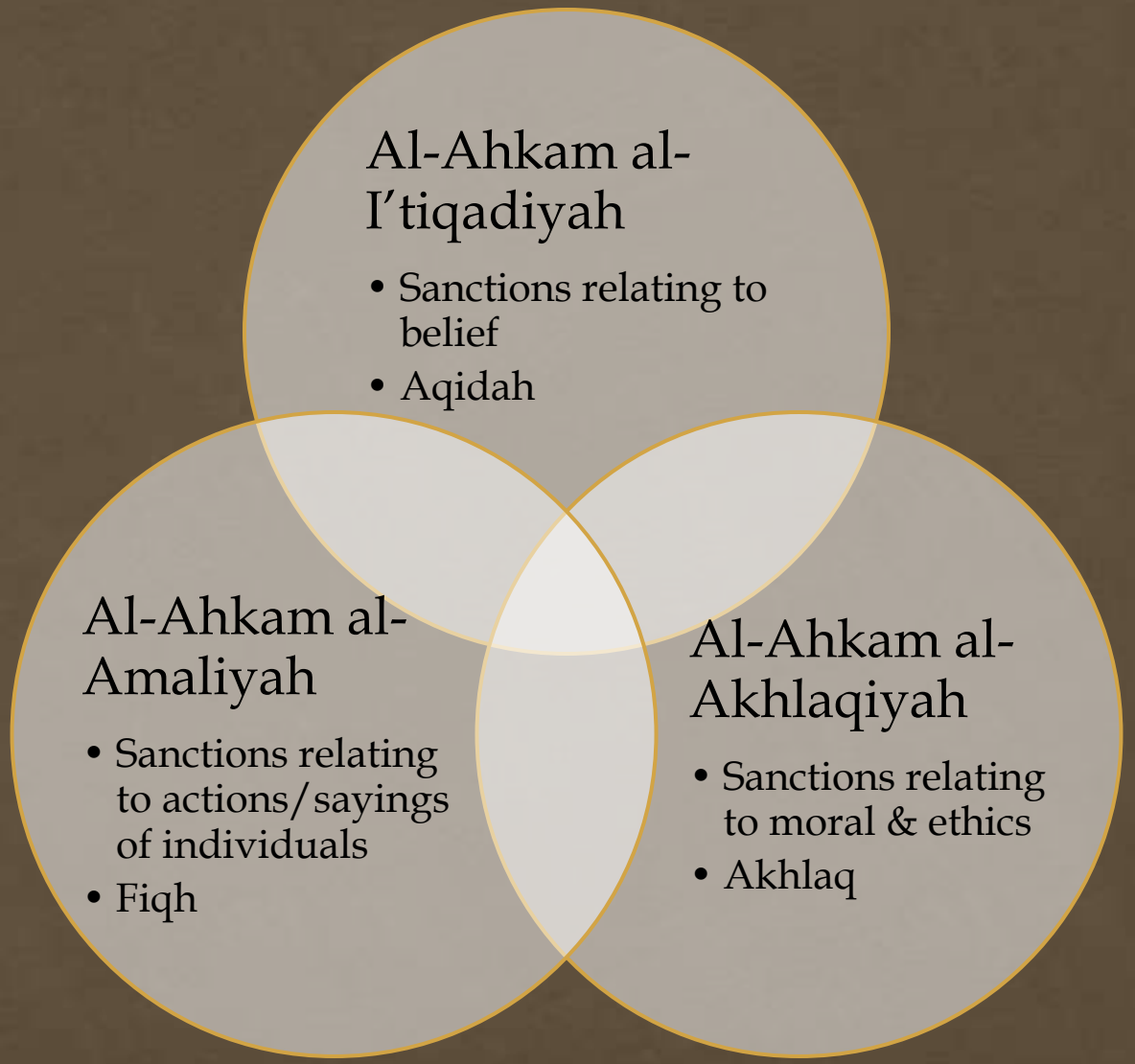
DEFINITION OF SHARI'AH

- Literally:
  - A waterhole where animals gather daily to drink or the straight path.
  - Path to be followed
  - A straight path as said by Allah:
    - "Then we put thee on the (right) way of religion. So follow thou that (way) and follow not the desires of those who know not"
      - (Quran: Jathiyah: 18)

DEFINITION OF SHARI'AH

- Technically:
  - The sum total of Islamic laws which were revealed to the Prophet Muhammad and which are recorded in the Holy Quran as well as deducible from the prophet's divinely guided lifestyle
    - (Muhammad Shalabee : 1969)
  - The right way of religion - wider than mere formal rites and legal provisions which mostly came in Madinah after Makkah verses had been revealed. It encompasses all legal rules as belief rules (aqidah), moral (akhlaq) and the practical rules (shari'ah/fiqh)
    - (Abdullah Yusuf Ali : 2001)

COMPONENTS


Al-Ahkam al-I'tiqadiyah
• Sanctions relating to belief
• Aqidah
Al-Ahkam al-Amaliyah
• Sanctions relating to actions/sayings of individuals
• Fiqh
Al-Ahkam al-Akhlaqiyah
• Sanctions relating to moral & ethics
• Akhlaq

DEFINITION OF FIQH

- Literally:
  - The true understanding of what is intended.
  - Hadith: "Whoever Allah wishes good, he gives the fiqh of the religion".
- Technically:
  - 'The knowledge of the detailed rules of Islamic law with reference to conduct, that has been derived from its specific evidence'
  - It is the end product of usul fiqh

2 ASPECTS OF FIQH

Aspect 1

- The science of practical rules. Fiqh in this context means absolute understanding of something in terms of concept and validation.
- It is a body of legalized practical rules in Islam.
- From the definition, it derived the word 'hukm'.

Aspect 2

- The knowledge of the detailed rules of Islamic law in its various branches, or
- The knowledge of the practical rules of shari'ah acquired from the evidence in the sources.

DIFFERENCES BETWEEN SHARI'AH & FIQH

SHARI'AH	FIQH
The body of revealed laws found in the Quran & Sunnah	Body of laws deduced from shari'ah to cover specific situation not directly treated in Shari'ah law
Wider in scope-includes all human actions	Confined to human acts in terms of legality and illegality
Unchangeable, fixed	Changes according to circumstances under which it is applied
Lay down basic principles	Specific : show how the basic principle of shari'ah should be applied in given circumstances.

USUL FIQH

- Literally
  - Roots of Islamic laws
- Technically:
  - Methods by which rules of fiqh are deduced from their sources / methods how to deduce the hukum
  - They are the principles borne by the use of which the mujtahid arrives at the legal rules through specific evidence
- Al-Ghazali:
  - Usul fiqh is an expression emplyed for the evidences of these legal rules and for a knowledge of the broad ways in which they reveal such rules, and not by way of specific indication (for a specific rule).

DIFFERENCES BETWEEN SHARIAH AND FIQH

	SYARIAH	FIQH
1	• The wider circle, includes all human actions	• Confined to what are commonly understood as human acts as far as their legality and illegality are concerned
2	• The body of revelaaled injuction found both in the Quran and Sunnah	• Fiqh is one component of shariah
3	• Fixed and unchangeable	• Certain rulings on fiqh changes to the changes of circumstances under which it is applied
4	• Based on revelation in which the knowledge is only obtained from the Quran and or Sunnah	• Power of reasong is stressed, deductions based upon knowledge are continously referred to with approval
5	• Various degree of approval or disapproval	• Action is either legal or illegal

DIFFERENCES BETWEEN FIQH & USUL FIQH

	FIQH	USUL FIQH
1	• Concerned with the knowledge of detailed rules of Islamic law in its various branches	• Methods that are applied in the deduction of such rules from their sources
2	• The law itself	• Methodology of the law

DIFFERENCES BETWEEN QF AND USULFIQH

	USUL FIQH	QAWAID FIQHIYYAH
1	• Is concerned with the methodology of legal reasoning	• Maxims are based on the fiqh itself
2	• Method which been applied in deducing law	• Principle of the law
3	• External part of fiqh	• Internal part of fiqh

RULINGS RELATED TO SHARIAH

- **Wajib**
  - Obligatory
- **Mandub**
  - Voluntary
- **Mubah**
  - Permissible
- **Makruh**
  - Dislike
- **Haram**
  - Forbidden

SOURCES OF QAWAID FIQHIYYAH

PRIMARY SOURCES

- Al-Quran
- Sunnah
- Ijma'
- Qiyas

SECONDARY SOURCES

- Istihsan (juristic preference of the stronger principles)
- Istishab(Presumption of continuity)
- Maslahah Mursalah (extended analogy/ consideration of public interest)
- Sadd al-Zarai' (blocking unlawful means to an unlawful end)

AL-QURAN

- The fundamental and main sources of Islamic Law from which all other sources derive their authority
- It may be defined as:
  - The book containing the speech of Allah, revealed to Prophet Muhammad in Arabic and transmitted to us by continuous testimony, or tawatur.
- Consists of the word of Allah SWT revealed on Prophet Muhammad saw in 23 years – divine origin
- Address to all humanity, without distinction of race, region or time
- It seeks to guide human beings in all aspect of life

THE SUNNAH

- Sunnah
  - Literally: a way or rule or manner of acting
  - Technically: What has been (authentically) related to us on behalf of the Prophet from his sayings, actions, and tacit approvals.
- Hadith
  - Literally: communication, story, conversation
  - Technically: What was transmitted on the authority of the Prophet ,his deeds, sayings, and tacit approvals, or description of his sifaat (features)."
  - Both cover the same ground: practice, sayings and tacit approvals(taqrir)
- Quran generally deals with the broad principles or essential of religion. The details are supplied by Prophet saw through hadith

IJMA'

- Ijma' – Consensus of opinion among the jurist on certain issues and ruling
- Literally:
  - Ijma is the verbal noun of the Arabic word Ajma'a which has two meanings:
    - To determine
    - To agree upon something
- Technically
  - Consensus of mujtahids (jurist) from the ummah oh Muhammad (saw), after his death in a determined period upon a rule of Islamic law
- Consensus of opinion among the jurist of a particular period on a question of law
- Ijma' maybe based on Quran, hadith or analogy

QIYAS

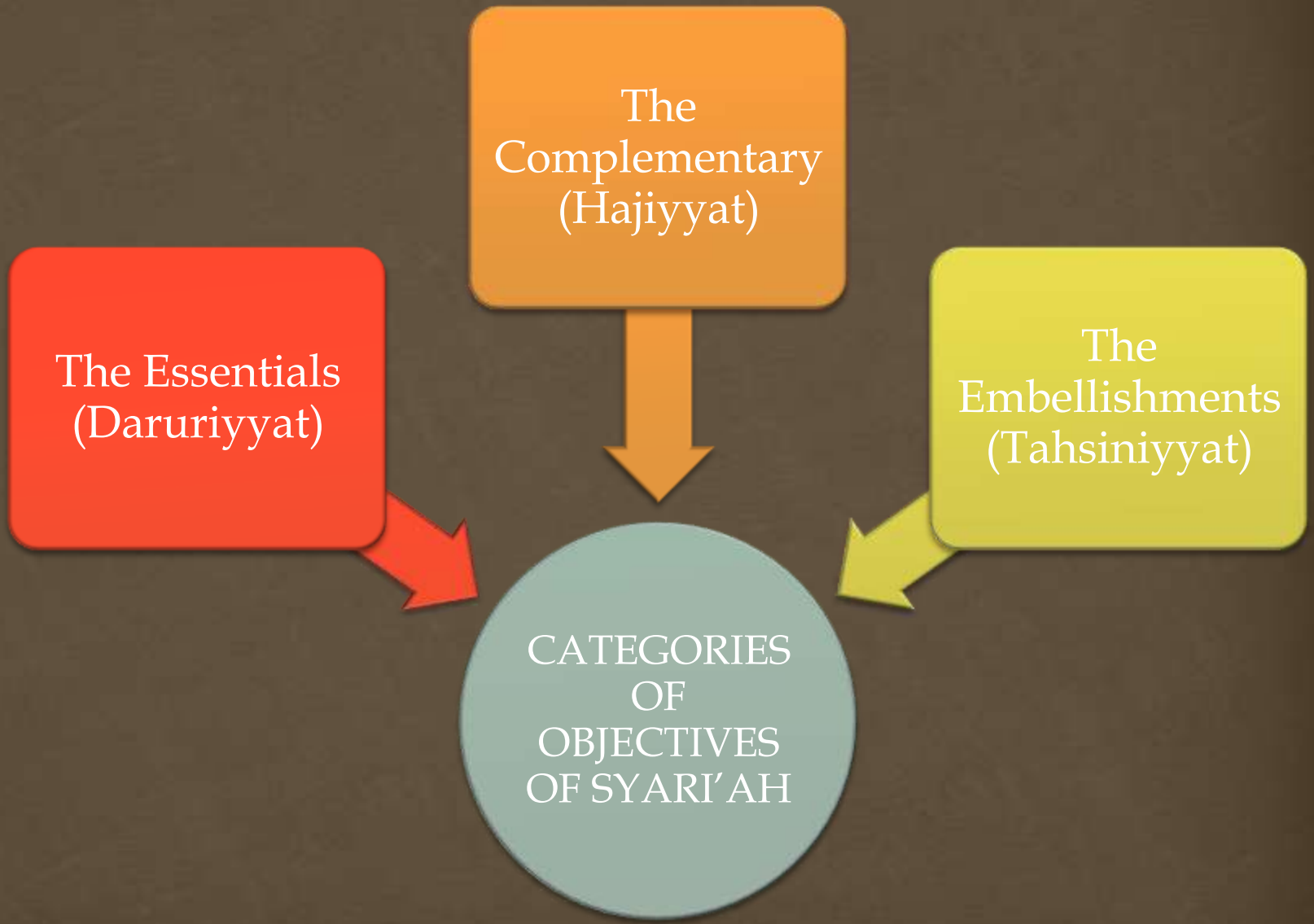
- Qiyas – analogical deduction
- Literal
  - Measuring or estimating on thing in terms of another
- Technical
  - The extension of Shar'iah ruling from an original case (Asl) to a new case (far') because the new case has the same effective cause (Illah) as the original case.
- Qiyas or analogy is resorted to in respect of problems about which there is no specific provision in the Quran or the Sunnah of the Prophet
- Analogical deduction of new issues on existing evidence from the Quran and Sunnah
- Process by which a rule of law is deduced from original text in views of common effective cause (illah)

MAQASID AL-SHARIAH

- The primary objectives of the shariah is the realization of benefit to the people, concerning to their affairs both in this world and the hereafter.
- It is generally held that the shariah in all parts aims at securing a benefit for the people or protecting them against corruption and evil.
- The Quran explained the main objectives of shariah when it declares

  - " and We sent you (O Muhammad SAW) not but as a mercy for 'alamin (mankind,jinns and all the exists)
    - (Al-Anbiya':107)

CATEGORIES OF OBJECTIVES OF SYARI'AH



THE ESSENTIALS (AL-DARURIYYAT)

- The essentials are the matter on which the religion and worldly affairs of the people depend upon, their neglect will lead to the total disruption and disorder and it could lead to evil ending.
- The essentials can be divided into the protection of the 5 fundamental values. These five values are :

AL-DARURIYYAH AL-KHAMSAH

- Protection of al-din
- Protection of life (al-nafs)
- Protection of dignity (al-'ird)
- Protection of intellect (al-'aql)
- Protection of property (al-mal)

PROTECTION OF AL-DIN

- Al-din is the most important values that must be protected by the Muslims. It is obligatory upon each and every Muslims to protect his al-din.
- The protection of al-din at personal level is achieved through the observance of ibadah, such as performing the 5 prayers, fasting, paying zakah and performing hajj.
- Executing all these rituals will increase the iman of the person and will therefore be a shield to protect the person from committing sin or indulging in any action that will destroy his din.

PROTECTION OF AL-DIN

- As an example, the Quran has pointed out that performing prayers will save a person from evil:

  - "…and perform al-salat. Verily, al-salat prevents from al-fahsya (i.e great sins of every kind, unlawful sexual intercouse, etc) and al-munkar (i.e disbelief)"
- (al-Ankabut:45)
- The protection of al-din at the wider scope involves defending Islamic faith particularly if it is attacked by the enemy of Islam.
- For instance, the situation demands waging of war with the enemy of Islam, then it should be done for the sake of protecting Islam from being destroyed by others

PROTECTION OF LIFE (AL-NAFS)

- Life is essential and valuable to everyone. Protecting everyone's life is equally important and obligatory to each and every individual and societies.
- In the punishment of the murderer, even though one life is killed because of the crime, this will lead to saving many more lives as the punishment will deter others from committing such crime.
- The al-Quran emphasis this point when it says:
- " and there is (a saving of) life for you in al-qisas (the law of equality in punishment), O men of understanding, that you may become al-muttaqin (the pious)"
  - (al-Baqarah:179)

PROTECTION OF LIFE (AL-NAFS)

- It is important to note that generally, saving of one's life is required, however it should not be done at the expenses of other lives.
- For example, saving a drowning person is compulsory, but if the saving of this life might lead to losing of another life, then it should not be done as the principles of shari'ah states:
- "a particular harm shall not be removed by inflicting another harm"

PROTECTION OF PROPERTY (AL-MAL)

- Acquiring property is one of the necessities of mankind. Everyone has his own property and would like to have all the necessary protection for his property. Islam has ordered that no one should acquire the property of others without legitimate reasons and without proper contract.
- Al-Quran emphasizes this point when it say :
  - "and eat up not one another's property unjustly, nor give bribery to the rulers that you may knowingly eat up a part of the property of others sinfully."
  - (al-Baqarah:188)
- God has placed laws to regulate the commerce and transactions between people, in order to ensure fair dealing, economic justice and to prevent oppression and dispute.

PROTECTION OF PROPERTY (AL-MAL)

- There are several ways of acquiring the property of others illegitimately e.g. : taking riba', cheating in transaction, breaking the trust in matters related to property, stealing property of others and etc. The shari'ah prohibits all these means.
- Chopping off the hand of a thief is the punishment for those convicted for stealing. Al-Quran mentioned the punishment when it says:
  - "cut off the hand of the thief, male or female, as a recompense for that which they committed, a punishment by way of example from Allah. And Allah is All Powerful, all Wise"
  - (al-Ma'idah:38)

PROTECTION OF THE INTELLECT OR MIND (AL-AQL)

- Al-aql is a great gift from Allah s.w.t to mankind. This is one of the human capacities that differentiates man from animals.
- Allah s.w.t has ordered that everyone should protect this precious gift from Allah by utilizing the mental for benefit of all and not for anything that might lead to destruction.
- Islam has given freedom for its followers to express their views and has tolerated the differences of views and opinion.

PROTECTION OF THE INTELLECT OR MIND (AL-AQL)

- Protection of the mind requires safeguarding it from anything that might harm the ability and function of brain
  - e.g: the consumption of liquor or any similar substance that will disturb the function of brain.
- The Quran forbids liquor when it says:
  - "o you who believe! Intoxicant, gambling, Al-Ansab and Al-Azlam are an abomination of Syaitan's handiwork. So avoid that in order that you may be successful"
  - (al-Ma'idah : 90)
- He has also imposed preventative punishments in order that people stay away from them.
  - e.g: punishment for those who consume liquor = eighty lashes

PROTECTION OF DIGNITY (AL-IRD)

- Islam is very concern about dignity of a person and emphasizes the importance of protecting dignity.
- It also ensuring that the relationship between man and women are done in respectful and responsible way. Free mixing between the two sexes is disallowed.
- Islam has regulated the relationship by encouraging its followers to enter into marriage contract. The Prophet s.a.w. is reported to have said in hadith:
- "O Youth! Those of you who have the means to get married shall do it, as it is better to protect your eye and your desire, as for those who are unable to do so, he shall fast as it is a protection for you"

PROTECTION OF DIGNITY (AL-IRD)

- Furthermore, Islam prohibits it followers from accusing others of mischief such as committing adultery or other immortal behaviors.
  - "verily, those who accuse chaste women, who ever even think of anything touching their chastity and are good believers; are cursed in this life and in the hereafter, and for them will be a great torment"
  - (al-Nur:23)

THE COMPLEMENTARY (AL-HAJIYYAT)

- The complementary interest on the whole supplement to the five essential interests and its refers to those kind of interest who neglect leads to hardship of the individual or community although it does not lead to the total disruption of normal life.
- There are Many example of al-hajiyyat such as the rukhsah that the shariah has granted in regards to ibadah for the travelers and the sick.
- Travelers are allowed to combine and shorten their prayers and break fast in Ramadan.A sick person is allowed to pray in sitting or sleeping position and break his fast in Ramadan

THE EMBELLISHMENTS(AL-TAHSNIYYAT)

- The embellishments refer to interests whose realization lead to improvement and the attainment of that which is desirable.
- Therefore, the observance of cleanliness in personal appearance and in ibadah, moral virtues and avoiding extravagance and measure that are designed to prevent proliferation of false claims in the courts.
- The disappearance of tahsiniyyat may not interrupt the normal life, but it might lead to the lack of comfort in life.

END OF CHAPTER

QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

THE PRINCIPLE OF NIYYAH

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- PHASES OF NIYYAT
- EVIDENCES
- SIGNIFICANCE OF INTENTION
- POSITION OF INTENTION
- RELATED MAXIMS
- ACT & INTENTION
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Matters are determined according to intention (Art 2)

INTRODUCTION

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- Comprehensive maxim
  - has implications for at least seventy different branches of knowledge-comprises a third of all knowledge.
  - Discussed in various areas including devotional matters, commercial transaction and crimes.
- Play an important role in differentiating action (with exception of several act e.g divorce, ruju')

DEFINITION

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- Intention (niyyah) is the will directed towards an action
  - E.g. : A fires a shot at B with intention to kill him = willed the action and intended to kill that person
- An act of human being is judged in the light of the intention or the purpose it seeks to have an effect - PHASES and hadith
- "Man ata firasyahu wa huwa yanwi an yaquma yusalli minallail faghalabathu ainuhu hatta yusbihu kutiba lahu ma nawa"
  - (al-Nasa'ie)
- (Whoever goes to bed, he put an intention (niyyat) to wake up early to perform qiyamullail, but overslept till dawn, he will get what he intends…)

5 PHASES OF NIYYAT

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al-Hajiz	the first impact of the intention upon the heart.
al-Khatir	where intention permeates the heart
al-Nafs	where a person is uncertain between the thought of doing the thought and that of refraining there from
al-Hamm	where the intention to commit the acts overshadows the thought of refraining there from
al-'Azm	where the intention is so solidified by the will and the determination to implement the act

MEANING

- Whatever we do in this world is based on our intention/niyyah which will affect the hukm of the deed whether it is sah/batal/haram
  - e.g intention to get married
- In the hereafter, we will be judged according to our intention
  - i.e: if we ikhlas we will get reward and if we riya', then we will be punished

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EVIDENCES

- Al-Quran
  - ..those who wish for returns from worldly affairs, We will give them to you, and those wish for return in hereafter, We will give the share of hereafter"
    - Ali Imran: 145
- Hadith:
  - "Deeds are judged by intention and every person is judged according to his intention"
    - (narrated by Umar r.a.)
  -
  - "There is no deeds to those who have no intention"
    - (narrated by Anas r.a.)

EVIDENCES

- The Mejelle
  - Art 2 = Matters are determined according to intention
    - Effect of transaction depends on intention
    - Illustration:
      - A person finds anything on highway or anywhere else with the intention of restoring it to the owner, his conduct is in order/correct
      - If intends to keep as his own property = wrongful appropriation of property
      - Same act but different intention
      - Judgment is based on the intention

IMPORTANCE OF INTENTION

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Differentiate between ibadah and adah (custom of personal habit).

- Some actions can be considered as personal habits if the actions are performed without proper intention to do it as form of ibadah.
- Example: Taking rest in the masjid vs. iktikaf

Differentiate between one kind of ibadah with the other

- Example: Solat, fasting, hajj and umrah, zakat and sadaqah/nazar etc.

SIGNIFICANCE OF INTENTION

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- Intention becomes important only if coupled with actions
- An act depends on intention/purpose
- Plays a crucial role in differentiating :
  - a murder from wrongful killing
    - Punishment between death penalty and compensation
  - husband may utter to conclude the occurrence or otherwise of a divorce
    - Intention of husband being considered by court before pronouncement of divorce
  - valid contracts
    - Intention to create legal relation
    - Not simply social/domestic agreement
- If fail to understand = recourse to outwards meaning

POSITION OF INTENTION

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- The position of intention is in the heart, not enough to utter it without having intention in heart.
- Uttering the intention is not requirement – no proof from Prophet (s.a.w) or sahabah
- Shafie':
  - Recommended to pronounce the intention in the heart
- Hanbali:
  - Uttering the intention is not recommended and consider it as form of bid'ah
- Maliki:
  - Uttering the intention is permitted – but better not to utter it

RELATED MAXIMS

- Where intention and actions are different, judgment must be based on intention to the extent it may be ascertained
- Some related application of the maxim :
  - In Contract
  - In Ibadah
  - Real vs. metaphorical meaning
  - Explicit vs. implicit meaning
  - Absolute vs. restricted speech
  - Objective vs. Mean

RELATED MAXIM - IN CONTRACT

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- In contracts , effect is given to intention and meaning, and not words and forms (Art 3)
- Where there are differences between expression and meaning , consideration is given to the meaning and not literal wording
- Example :
  - Contract with remuneration = contract for hire; if no remuneration, contract is for loan
  - If 2 persons conclude a contract apparently a loan, but in consideration for rental provided for the contract, the contract would be regarded as contract for loannas wording for the contract suggest
  - Hiwalah vs. Kafalah

RELATED MAXIM - IN CONTRACT

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- Correspondence resembles conversation (Art 69)
- If difficult to ascertain intention, look at outwards connotation
- Hadith = We give judgment on the basis of the apparent, God takes care of inward intention
- Matters difficult to discover truth are judged according to the obvious proof concerning outward connotation
- Knowledge of intention is important to determine correct ruling , if fail to go to the intention, have to recourse to outwards meaning

RELATED MAXIM - IN IBADAH

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- No intention is needed in the ibadat which is not ‘adah (traditional/custom)
  - e.g. reciting quran, doa, zikir
  - as opposed to eating, playing, sitting, reading books
- Intention is needed in the ibadah which have similarities
  - e.g. zakat and sadaqah

RELATED MAXIM - REAL VS. METAPHORICAL

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- Types of speech :
  - Real
    - Expressions used in its proper place in the language or common usage
    - Lion refers to that of animal
  - Metaphorical
    - Expressions not used in their proper linguistics place
    - E.g. Lion to describe a brave man
  - Derelict
    - That which has passed out of use and therefore cannot give any meaning

RELATED MAXIM - REAL VS. METAPHORICAL

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- In principle, words shall be construed according to their real meaning (Art 12)
  - E.g. : A makes a waqf of his house for benefits of his sons. If A has sons and grandsons at time of his death, the property goes to his son only
  - Real word of son does not include grandson
- When real meaning cannot be applied, the metaphorical sense may be used (Art 61)
  - E.g. : A has no sons but only grandsons, the word "sons" refers to his grandsons as it is impossible to apply the literal meaning; the grandsons are entitled to the waqf

RELATED MAXIM - REAL VS. METAPHORICAL

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- If no meaning can be attached to a word it is disregarded altogether (Art 62)
- Must still give some meaning to the words rather than disregard them
- If still cannot be ascertained i.e. still no meaning even after using real and metaphorical sense, then the word will be disregarded -
  - A alleged B is his son whereas B is older than A

RELATED MAXIM - REAL VS. METAPHORICAL

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- Conflict between real and metaphorical meaning, and the former is derelict - give effect to metaphorical meaning.
- Must consider custom of a place to determine metaphorical meaning
  - Custom must be continuous and predominant

RELATED MAXIM - EXPLICIT VS IMPLICIT

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- No attention shall be paid to inferences in the face of an explicit statement (Art 13)
- Explicit words/expressions
  - Clear, definite meaning
  - Stronger status than implied connotation
- E.g. :
  - A leaves property with shopkeeper B , B is aware and keeps silent = property in his custody - B declines to keep, no contract of custody

RELATED MAXIM - EXPLICIT VS IMPLICIT

- Permission may be given explicitly or by implication (Art)
- Implicit :
  - Speech with hidden intention
  - Requires explanation for proper understanding
- Minor of perfect understanding enters into business with knowledge of his guardian who does not prohibit the minor = considered has obtained permission by implication
- Example:
  - Buying food at canteen without saying a word; offer and acceptance exist; a valid contract

RELATED MAXIM - EXPLICIT VS IMPLICIT

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- In obscure matters the proof of a thing stands in the place of such a thing (Art 68)
- Status of silence
  - No effect/consequences
  - Effective only supported by facts of case
- Hence, no statement is charged to a man who keeps silence, but silence is tantamount to a statement where it is necessary for speech

RELATED MAXIM - ABSOLUTE VS RESTRICTED

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- The absolute is construed in its absolute sense, provided there is no proof of restricted meaning either explicit text or by implication (Art 64)
- Absolute Speech
  - Without restrictions/qualifications
- Example
  - A appoints B as his agent to sell his house without specifying the price

RELATED MAXIM - ABSOLUTE VS RESTRICTED

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- Restricted Speech
  - Accompanied with specification/description
- Example
  - Subject to certain price of sale or other limitation

RELATED MAXIM-OBJECTIVE VS MEAN

- The ends does not justify the means
- (Al-ghayah la tubarriru al-wasilah)
- Good intention cannot be accepted if the means are contradict to Islam
- Example:
  - Donate the money gain from the win of lottery to the needy. Welfare Lottery, amal-based concert.

RELATIONSHIP BETWEEN AN ACT AND INTENTION

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1. Act/ policies that are good in themselves and are actuated by good objectives/ intentions
   - Ideal
   - Example: Government to promote public welfare through zakat and charity funds
2. Act/ policies that are not good in themselves but are resorted for commendable objectives
   - Need to make an amendment
   - Example: Mobilizing funds for charity by means of games or by floating interest-bearing loans and bonds
3. Act/ policies that are actuated by objectionable intentions but lead to good results
   - Need to make an amendment
   - Example: Nationalization or rationalization of the products and industries and avoidance of incongruent growth of industry
4. Objectionable intentions with objectionable policies
   - Rejected
   - Example: Smuggling of wine for use by Muslims

APPLICATION

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- Surety ship (kafala) implies coextensive liability while transfer of debt (hawala) implies discharge of the principal debtor. If a contract of transfer of debt (hawala) is made with the condition to hold the principle debtor liable in case the transferee fails to discharge the debt, contract even though termed as a contract of hawala will be treated as contract of kafala. Similar will be the treatment of a contract of kafala in case the principle debtor is discharged after contract of surety ship is signed.
- In case government issues a license to setup an industry, or start a trade or import some merchandise it will not lawful to sell the license because the object of the license was the authorization to set up an industry or trade or purchase of goods but not to make the license itself an article of trade

APPLICATION

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- If the banks declare their policy of financing their client on non-interest bases it would be necessary to do so and not merely continue the same practice and seeking to rationalize it in Islamic terms by changing the relevant nomenclature such as calling it “buy-back” or “mark-up”
- It is not permissible for the bank to practice Mushara and Mudharaba in such a way as to ensure a fixed rate of return for the bank while the liability of bearing loss or an uncertain amount of remaining profit is tranferred to the working partner
- If government allots plots of land to individual with the object of providing accomodation for themselves the allottee will be allotting the implicit terms of the agreement by converting it into a commercial or industrial site or by treating it as merchandise

END OF CHAPTER

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QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

THE PRINCIPLE OF YAQEEN

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THE MAXIM

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With doubt certitude does not fade

Certainty is not dispelled by doubt (Art 4)

INTRODUCTION

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- Meaning:
  - Something that is certain could not be removed with the appearance of doubt.
  - Certainty can only be remove by another certainty.
- A general principle in law of evidence.
- This maxim is very important in the absence of proof on either disputing side.
- The judgment in court case depends on the standard of proof.
- The standard of proof:
  - Balance of probabilities
  - Beyond reasonable doubt (highest degree of evidence)

EVIDENCES

- Al-Quran:

وَمَا يَتَّبِعُ أَكْثَرُهُمْ إِلَّا ظَنًّا ۚ إِنَّ ٱلظَّنَّ لَا يُغْنِى مِنَ ٱلْحَقِّ شَيْـًٔا ۚ إِنَّ ٱللَّهَ عَلِيمٌۢ بِمَا يَفْعَلُونَ ﴿٣٦﴾

- "Most of them follow nothing but zann (fancy); truly fancy can be of no avail against truth. Verily God is aware of all that they do."(10:37)

EVIDENCES

- Hadith:
  - "If one of you feel something in his stomach during his prayer, and it is difficult for him to ascertain whether such thing had discharged or not, thus do not stop his prayer until he do hear sound or smell"
  - "If anyone forget in his solat and unsure whether he has completed 1 or 2 rakaat, so take 1 rakaat, if unsure between 2 or 3 rakaat, take 2 rakaat."
  - Have to take the certain one and reject the new one which has created confusion.

ISSUE: THE BURDEN OF PROOF

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- In dispute, 2 parties involved
  1. claims something/ accusing someone
  2. denies the claims/ denies the accusation
- So, in judicial dispute, it is important to know upon whom the oaths of proof lies
- The burden of proof is on him who alleges, and the oath on him who denies
  - ➲ if someone claims something towards another, it is his his duty to prove it, because the defendant is presumed to be free from any liability

ISSUE: THE BURDEN OF PROOF

- الأصل براءة الذمة
- Freedom from liability is a fundamental principle (Art 8)
- Example:
  - If a person destroys the property of another and a dispute arises as who will be held responsible,, the statement of the person causing such destruction shall be heard and the burden of proof is upon the owner of the property.
- Related with the application of Istishab approved by Shafi'i jurists
- The proofs of a matter requires a presentation of evidence until the matter attain the degree of certainty

DEGREE OF CERTAINTY

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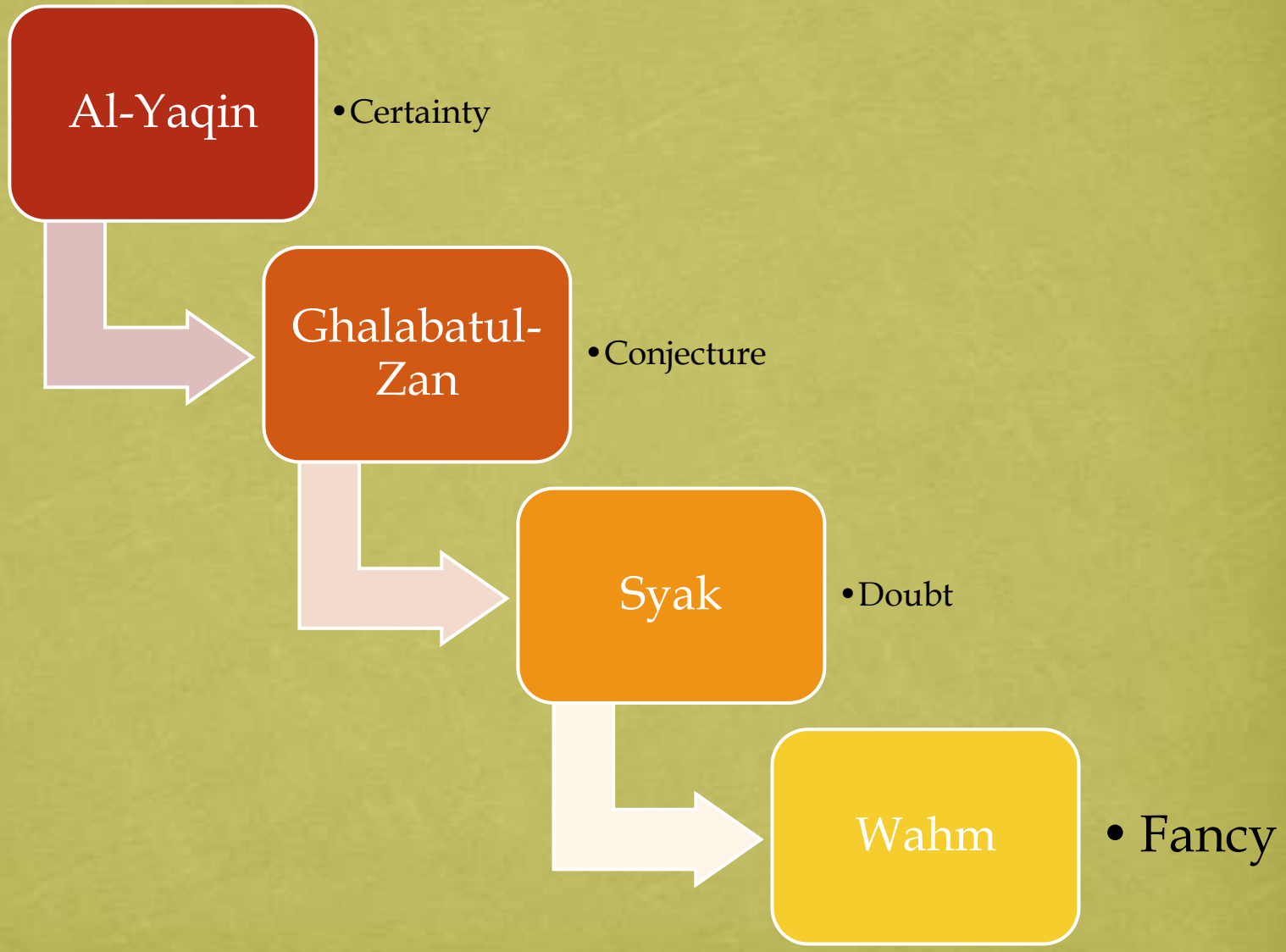

AL-YAQIN

- Al-yaqin refers to a feeling of confidence upon something where there is no doubt at all.
- Example:
  - A was caught with 4 witnesses while committing zina, the evidence brings to certainty.

ZAN & GHALABATUL-ZAN

- It means siding which is 75% towards al-yaqin (certainty) and 25% toward non-yaqin
- Example:
  - if the sinking of ship has been established, the death of its passengers would be presumed on the basis of plausible conjecture(probability)

ZANN

- Maxim:
  - "No validity is attached to conjecture (zann) which is obviously tainted by error" (Art 72)
- Zann (conjecture) = siding toward the correctness
- "Conjecture can not take the place of truth"(10:36)
- Zann, if it is plausible, may take the place of certainty when the latter is unattainable.

SHAK (DOUBT)

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- Maxim:
  - "Certainty is not dispelled by doubt"
- It refers to a feeling between two fences of yaqin and non-yaqin which is 50% towards certainty and another 50% inclines towards non-yaqin
- Between certainty and uncertainty.
- Not sufficient to dispel certainty

WAHM (FANCY)

- Maxim: “No weight is attached to fancy” (Art 74)
- It means siding which is 75% towards nonj-yaqin and only 25% towards yaqin.
- It cannot be relied at all and has no consequences
- Siding towards the incorrectness (error)
- Mere supposition is to be rejected.

RELATED MAXIMS

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- الأصل بقاء ما كان على ما كان
- It is a fundamental principle that a thing shall remain as it was originally (Art 5)
- Meaning:
  - What is apparent is presumed to be the original state (go back to the originality).
- In the matter of burden of proof, the burden is upon the plaintiff or the prosecutor
- Example:
  - A debtor is considered liable until proven that he had paid the loan;
  - A couple charged with khalwat is considered unmarried unless proven otherwise.

RELATED MAXIMS

- الأصل فى الصفات العارضة العدم
- Something is considered non-existence in the first place(Art 9)
- Meaning:
  - Generally, non existence is prior to existence.
- Example:
  - In Mudharabah, if there is dispute between rabbulmaal and mudarib on whether or not profit had been made, the word of mudharib is taken into account unless proven otherwise;
  - If Maria claimed that Ali had breached his promise to marry her but denied by Ali, the promise is considered non-existence unless proven.

RELATED MAXIMS

- الأصل براءة الذمة
- Freedom from indebtedness is to be presumed, or freedom from liability is a fundamental principle (Art 8)
- Meaning:
  - One cannot be considered liable and the condition shall remain as it is until proven otherwise.
- Example:
  - A crime suspect is considered innocent until proven guilty
  - If 2 persons quarrel with each others on the price of damaging goods, the person who bears the loss will get the compensation

RELATED MAXIMS

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- A thing established by proof is equivalent to a thing established by visual inspections.(Art. 75)
- General rule:
  - A claim, though authentic, is of no consequence if a claimant is unable to prove it
- The proof of a matter require presentation of evidence until the matter attain the degree of certainty.

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- الأصل في الأشياء الإباحة حتى يدل الدليل على التحريم
- The origin of a thing is permissible unless proven otherwise
- Meaning:
  - According to As-Syafie, anything is considered permissible originally until there is prove that the thing is prohibited.
- Applied mainly in muamalat.

RELATED MAXIMS

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- الأصل في الأشياء التحريم حتى يدل الدليل على التحريم الإباحة
- The origin of a thing is prohibited unless proven otherwise
- Meaning:
  - According to Hanafi, anything is considered haram or prohibited unless there is prove that it permissible/mubah.
- Applicable mainly in ibadah.

APPLICATION

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- If a person is certain that he is in the state of ablution, he is considered to have ablution until there is evidence or indication showing otherwise
- If a person has taken a loan from another person and is in doubt whether he is still in debt, he is considered to be in debt until there is proof to show otherwise
- Of a man marries a woman through a valid contract, then a doubt occurs regarding the divorce of his wife, their marriage would be considered valid because the doubt has arisen after certainty. This doubt of divorce, therefore cannot remove the certainty of marriage

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QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

THE PRINCIPLE OF MASYAQQAH

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Hardship begets facility (Art 17)

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- For any ruling which implementation causes hardship to a person or, any action which is unable to be performed by a particular person for a specific acceptable reason.
- There are alternatives or way out that can be used or resorted to in order to overcome the difficulty or hardship.

MEANING

- The rule of law has been designed as to be general in nature and thus, to consider all situations and all individuals, not merely particular situations or individuals.
- As a result, the application of rules in certain circumstances cause difficulties to people.
- Adherence to law turns into injury and injustice.

MEANING

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- In this respect Imam Ghazali is reported to have said,
  - "everything that exceeds its limit changes into its opposite"
- Thus, it becomes necessary to lighten the people's burden and to disregard general rules in certain exceptional circumstances if their application were to result injury and hardship.
- Many legal rules such as loan, transfer of debt, bay as-salam etc are derived from this principle.

MEANING

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- That is to say difficulty is the cause for easiness, and in time of urgency latitude must be shown.
- Many legal rules, such as loans, transfer of debts, and incapacity, are derived from this principle and the leniency and indulgence shown by jurists in their rulings are all based upon this rule
- The leniency and tolerance shown by jurists in their rulings are based on this rule/maxim.
- The Hanafi jurists gave expression to this principle in their application of the principle of Istihsan whereas the Malikis adopted the principle in their application of the principle of Masalih Mursalah.

EVIDENCES

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- QURAN :

وَمَا جَعَلَ عَلَيْكُمْ فِي ٱلدِّينِ مِنْ حَرَجٍ

- "…He did not make any difficulty for you regarding the religion (din of Islam)…" (al-Hajj:78)

يُرِيدُ ٱللَّهُ بِكُمُ ٱلْيُسْرَ وَلَا يُرِيدُ بِكُمُ ٱلْعُسْرَ

- "…Allah wants ease for you and He does not wants hardship for you…" (al-Baqarah:185)

لَا يُكَلِّفُ ٱللَّهُ نَفْسًا إِلَّا وُسْعَهَا

- "…Allah does not give anyone legal responsibility for anything except what is within his capacity…" (al-Baqarah:286)

EVIDENCES

- All the verses indicate the fact that Allah does not intend to burden human beings in all the injunctions that He has revealed. Therefore if there exists any injunction which is difficult to be performed for a valid reason, then there will always be an alternative.

EVIDENCES

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- HADITH :
  - "You have not been sent like those who have been given hardship. Rather, you have been sent as those who have been given ease or facility"
    - (narrated by Bukhari and Muslim)
  - "Surely Allah (s.w.t) introduced the din as easy, full with kindness, and wide. He did not make it narrow"
    - (narrated by Tabarani)
  - Aishah r.a said: "Whenever the Prophet (s.a.w) was given a choice between two things he chose the easier one unless it was a sin"
    - (narrated by Bukhari and Muslim)

EVIDENCES

- The Prophet was reported to have forbidden the penalty of cutting the hand of thieves if the thefts be committed in the course of a raid.
- By analogy the jurists ordered the suspension of penalties and punishment in enemy territory lest the convicts join the enemy.

SCOPE OF MASYAQQAH

- Not all hardship are recognized as masyaqqah (burden).
- Hardship in this maxim refers to hardship that surpass the normal limit and ability of a person to perform them (extraordinary burden) –
- Examples:
  - Hardship of travel or sickness.
  - Heavy burden that consume our energy all the time or might cause damage to ourselves and property. Hardship which is bearable and within the ability of a person to tolerate it does not fall under this maxim.
  - Energy spent in finding nafkah, taking bath with cold water, fasting in a hot day or a long day time etc.

SCOPE OF MASYAQQAH

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- Hardship refer to necessity and need and not to a non essential interest (luxury).
- A situation of necessity refers to a person's striving to safeguard his religion, life, property, mind or lineage from destruction.
- A need refers to what is essential for the attainment of good life. Non-essentials apply to such things as "decoration."

REASONS FOR LENIENCY

Legalization of (rukhsah) in Islam/ reasons for leniency:

- Musafir
- Sickness
- Coercion/Force/Duress
- Forgetfulness
- Ignorance
- Umum Balwa (General Necessity)
- Deficiency Of Perfection (Al-naqs)

REASONS FOR LENIENCY

- Musafir
  - Can shorten & combined form of solat.
  - Solat Zuhur instead of Jumaat prayer.
  - Permission to defer obligatory fasting.

REASONS FOR LENIENCY

- Sickness
  - Permission to defer obligatory fasting.
  - Can tayammum instead of wudu'.
  - Can sit or lying down during solat if unable to stand
  - Can escape jemaah prayer.
  - Permissible for Dr. to see women's aurat during medical check up & treatment.
  - Permissible to use haram thing as medication.

REASONS FOR LENIENCY

- Coercion/Force/Duress
  - Person who is forced to eat haram food otherwise harm/injury will be inflicted on him that endanger his life is permissible to eat.
  - Person who is forced to say something Kufr, is permissible to say such thing as long as his faith is maintained in Islam. (al-Naml : 106)

REASONS FOR LENIENCY

- Forgetfulness
  - Those who are fasting then eat or drink due to forgetfulness, his fast will not be invalidated by such act.
  - (hadith narrated by Shaukani)

REASONS FOR LENIENCY

- Ignorance
  - Those who has share in the partnership property, didn't know that his partner has sold that property – his right in that property cannot be dispelled.

REASONS FOR LENIENCY

- Umum Balwa (General Necessity)
  - Those who suffer the disease (unable to control the discharge of his urine), are excused to perform solat in unclean (najis) condition.
  - Permissible to perform solat if got soil on the cloth during rainy days.

REASONS FOR LENIENCY

- Deficiency Of Perfection (Al-naqs)
  - In the case of minor, insane person – not
  - Women are not obliged to perform Jumaat prayer and Jihad.

RULING OF RUKHSAH

1. Obligatory
   - Eating haram food when halal food cannot be found, to save life, or to break fast when fasting would endanger one's health.
2. Recommended/ encouraged to do (sunat)
   - Qasr during long journey
3. Permissible (harus)
   - Bay' salam (settle the purchase price first, delivery of goods later on)
4. Advisable not to do
   - Tayammum for those who found water sold expensively while he is able to buy, performing jama' prayer while there is no hardship or difficulty.
5. Reprehensible (makruh)
   - Qasr for those who musafir less than 2 marhalah (84 km)

TYPES OF RUKHSAH

1. Rukhsah Isqat
   - The facility to drop the obligation/burden
   - Examples: To drop the obligation to perform Jumaat prayer, hajj etc. because of sickness. The facility to drop must come from the Shari'ah.
2. Rukhsah Tanqis
   - The facility to lessen or reduce the obligation/burden
   - Example: Shortening the prayer (qasar) during the journey.
3. Rukhsah Ibdal:
   - The facility to replace
   - Example: To replace wudhu' with tayammum in case of unavailability of water.

TYPES OF RUKHSAH

4. Rukhsah Taqdim & Ta'khir
   - The facility to perform in advance or The facility to delay the performance
   - Examples: Jama' taqdim prayer (performing Asar prayer in Zuhur prayer time) and performing Zuhur prayer during Asar prayer time (Jama' ta'khir)
5. Rukhsah Ittirar
   - The facility to tarkhis to ease the burden
   - Examples: Consuming food or drink that contain liquor or unclean (najis) ingredient for the purpose of medication.
6. Rukhsah Taghyir
   - The facility to change
   - Examples: Performing khauf prayer during the war (the ways the prayer is perform is different from the normal ways).

LIMITATION OF RULES

1. Limitation by text
   - Ibn Nujaym said: "Hardship may be pleaded only when no text exists"
2. Limitation by the extent of necessity
   - "Necessity is estimated by extent thereof" (Art 22)
   - Necessity is an exceptional circumstance and as such should be given a narrow and restricted interpretation – any licence that may be deemed necessary should not be absolute, but should be given a narrow and restricted interpretation
3. Limitation by times of necessity
   - License by necessity remains valid so long as the excuse of the course of urgency exists
   - If this exceptional circumstance disappears the leniency will also disappear and they will turn to the original principal

RELATED MAXIMS

- الضرورات تبيح المحظورات
- Necessity renders prohibited things permissible (Art 21)
- Meaning :
  - Prohibited things are allowed to be carried out under extreme circumstances provided there are no permissible alternatives.
- Example:
  - A person is allowed to consume prohibited food in order to survive under extreme situation provided that no other food is available.

RELATED MAXIMS

- There are several maxims that restrict the usage of this maxim:
- الضرورات تقدر بقدرها
- Necessities are estimated according to their quantity (Art 22)
- A thing permitted on account of an excuse becomes unlawful on the cessation of the excuse.
- When the prohibition has faded away, the forbidden things returns.
- Example:
  - A cup of liquor is needed to save his life, then the leniency is applicable for that particular amount only

RELATED MAXIMS

- إذا ضاق الأمر إتسع
- Where a matter is narrow it becomes wide (Art 18)
- Latitude should be afforded in the case of difficulty
- This means upon the appearance of hardship in any particular matter, latitude and indulgence must be shown.
- Examples:
  - a woman who is still in her period of menses or her husband has just passed away, during the waiting period time, she is permitted to go out of her home in order to enable her to work.
  - a debtor who was declared bankruptcy is allowed to postpone the repayment of his loan to his creditor until he is able to do it later or it's better for the creditor to consider the debt as a bad debt.

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- إذا إتسع الأمر ضاق
- When it is wide, it becomes narrow
- It becomes applicable once darurah occurred (if the original ruling is implemented, the difficulties will arise).
- So the rukhsah (leniency) is given.
- The original ruling will take its original function once darurah is over. (iza zala al-mani' 'ada al-mamnu')

RELATED MAXIMS

- ما جاز لعذر بطل بزواله
- Whatever is permissible owing to some excuse ceases to be permissible with the disappearance of the excuse (Art 23)
- When the necessary and darurat is no longer exist, then the leniency of the law is considered finished and the rules will be back to the original as usual
- Example:
  - If a person is interdicted because of madness, the interdiction is left upon his recovery
  - One is allowed to eat pork due to starvation in case there is no halal food, but once he find halal food, the permissibility is ceased

ISSUES

- Al-Istihalah (Transformation)
  - Jaiz (permissible) if the transformation is total (into another thing which is not similar to the original thing)
  - Examples:
    - A dead dog fall into a salt warehouse. It will undergo process of rusting until it become salt. The transformation is called istihalah and the salt is pure and permissible to be eaten.
  - What about al-istihalah in products which are considered as by product of a swine?

ISSUES

- Refer to situation of dharurah which renders difficulties
- The extent of difficulties
  - Difficulties in need NOT in luxury

APPLICATION

1. If someone enters into a rental contract and later on he has to travel, he is allowed to cancel the rental contract. Under a normal circumstance, a person is not allowed to cancel this contract unless it is agreed between the contracting parties beforehand. However, forcing a person to continue paying the rental when he is not occupying the premise, will amount to hardship, therefore the Shari'ah has allowed the cancellation under specific circumstances in order to avoid hardship.
2. The general ruling related to the implementation of punishment towards a person convicted for any crime is that the punishment should be carried out immediately upon conviction. However, under certain exceptional conditions, such as if the criminal is sick, the punishment can be deferred to a later time. This is to ease the person from additional hardship.

APPLICATION

3. Two men were traveling together, one of whom died in a place where no judge can be found. The living traveler is allowed to sell the property of his companion and to keep its price for the deceased's heirs without any legal power or instruction given by the latter to the former. Under normal circumstances none is allowed to sell the property of a dead man who is neither related to him or her, nor has issued any legal power for selling the property, but in this case, if the above living person does not sell the property of his companion it would be difficult for the former to carry the property of the latter.

APPLICATION

4. In relation to the option of stipulation (khiyar al-shart), there is a hadith that validates such an option for 3 days i.e. if the buyer wishes to reserve for himself this amount of time before the sale valid. The jurists have reasoned that this period may be extended to weeks or even months depending on the types of goods that are bought and the need of the buyer who may need a longer period for investigation.

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QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

THE PRINCIPLE OF DHARAR

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THE MAXIMS

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Harm must be eliminated or removed

Damage is put an end to (Art 20)

MEANING

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- All kind of injury should be removed or eliminated.
- Islam does not allow us to harm people or to let others harm us.
- Islamic law forbids anything which causes harm. Thus, what is considered harmful must be eliminated or avoided whenever possible.
- This maxim governs many rulings of fiqh as it is a general maxim which indicates the importance to remove all kinds of harm.
- The word “dharar” or harm in this maxim is general and it includes all kinds of harm whether it involves individual, society, or environment or any other matters. All necessary measures should be taken to prevent any kind of harm from happening.

MEANING

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- This maxim also means that it is obligatory for everyone to always strive to prevent harm before its occurrence through implementing precautionary measures.
- Likewise, it means that if any harm has occurred, then all necessary measure should be taken to remove it or to lessen its destructive implications whenever possible.
- As implemented by the principle sadd az-zarai'- to block means towards evil before occurrence/ prevention is better than cure

TYPES OF DHARAR

1. Harm which is caused intentionally in order to cause damage.
   - This kind of harm is definitely forbidden and the doer/person shall bear the consequences of his action.
2. Harm which is caused unintentionally without any intention to cause harm or damage to others.
   - Example: If a person burn something within the boundary of his property and suddenly the fire spreads to the neighbouring land and destroy the neighbour's property. In this case the person who ignites the fire has done it unintentionally and;
     - Not liable (according to Shafei and Hanafi)
     - Liable (according to Ahmad and Malik) and have to compensate unless the neighbour have given permission before the act- the neighbour is considered aware with the consequences and may give permission or not.

EVIDENCE

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- Al-Quran:

وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ ۛ وَأَحْسِنُوٓا ۛ إِنَّ ٱللَّهَ يُحِبُّ ٱلْمُحْسِنِينَ

- "… make not your own hands contribute to (your) destruction, but do good, for Allah Love those who do good…" (Al-baqarah: 195)

وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا۟ ۚ وَمَن يَفْعَلْ ذَٰلِكَ فَقَدْ ظَلَمَ نَفْسَهُۥ

- "but do not take them back to injure themor to take undue advantage, if anyone does that he is zalim towards himself…'(al-Baqarah:231)

EVIDENCE

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- Hadith:
  - La dharar wa la dhirara fil-Islam
  - “harm may neither be inflicted nor reciprocated in Islam”
- Dharar- inflicting others with dharar/ damage
- Dhirar- reciprocating other with dharar
- All these verses and hadith indicate the obligation to avoid any kind of harmful actions.

RELATED MAXIMS

- الضرورات تبيح المحظورات
- Necessity renders prohibited things permissible (Art 21)
- The application of this principle are numerous. They include exemption from legal duties/liabilities such as minority, lunacy, duress, forgetfulness and ignorance.
- Example:
  - Eating forbidden food in the case of dharurah.
  - It is also on the basis of this maxim that the jurists validate the demolition of an intermediate house to prevent the spread of fire to adjacent buildings, just as they validate dumping of the cargo of an overloaded ship to prevent the danger or dharar to the life of its passengers.
- BUT….

RELATED MAXIMS

- Exception/limitation to the scope:
- الضرر لا يزال بمثله
- Harm (dharar) is not eliminated by another harm (Art25)
- Meaning:
  - We cannot avoid harm by doing another harm
- Example:
  - A person is require to provide nafqah for his relatives. But to enforce this on a poor person who possesses a single meal would transfer the harm from one person to another. This removal or harm with another harm is not recommended.
  - In case a buyer gets faulty goods he is given the option to return the goods. But if the purchased goods have developed similar fault while in possession of the purchaser, he will lose his option to return the goods because, in order to protect himself from harm, he will also be harming the seller. This would amount to removing a harm by causing a similar harm.

RELATED MAXIMS

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- الضرورات تقدر بقدرها
- Dharar is measured in accordance with its true proportion(Art 22)
- Dharar is an exceptional circumstance, therefore, should be given a restricted interpretation. What is deemed necessary in the case of dharar should be allowed to the extent required for resolving the harm.
- Thus, if a theft of a loaf of bread be tolerated on a plea of hunger, the theft of one ton of flour would not be tolerated under any circumstance.
- Example:
  - If the court orders the sale of assets of negligent debtor to pay his creditors, it must begin with the sale of his moveable goods (if this is sufficient to clear the debt, before selling his immovable or real property.)

RELATED MAXIMS

- درء المفاسد أولى من جلب المصالح
- The repelling of evil is preferred to the acquisition of benefits (Art 30)
- Meaning:
  - If there a conflict between warding off an evil and securing benefit, the former is given preference over the latter
- Example:
  - Extensive gargle during days in Ramadhan. The hukum is reprehensible but the maslahah of a valid fast is given preference over disadvantage (mafsadah) of not performing sunat wudhu.

RELATED MAXIMS

- Examples:
  - Permissible to lie (originally it is haram) when the advantage is certain. For example, lying in the process of reconciliation two enemies
  - Stop or ban advertisement of cigar to prevent smoking habits. Because the injury (disadvantages of smoking) is given preference over the good (profit from advertisement)

RELATED MAXIMS

- يحتمل الضرر الخاص لدفع الضرر العام
- A private injury is tolerated in order to ward off the public injury (Art 26)
- Meaning:
  - To repel a public damage, private damage is preferred
  - Warding off public (majority) injury is given preference over personel (minority) injury
- Example:
  - Majority of jurists permit a person/ authority to interfere in the life of individuals, if such interference is required by public interest
  - Selling weapons during war is prohibited as the public injury (effects of war)is wider than private injury (loss towards weapons seller)

RELATED MAXIMS

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- Example:
  - Under the normal condition, Shariah allows free market operation. But in case traders manipulate the market fro large profits in a manner that harm the interest of the consumers/general public, the government may take action to regulate the price to protect the interest of the consumers. By doing so, the government will be preventing the general harm by tolerating a particular harm (towards several persons/ minority)

RELATED MAXIMS

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- الضرار الأشد يزال بالضرار الأخف
- Greater harm must be prevented even at the expense of the lesser harm"/ severe damage can be avoided by lighter damage (Art 27)
- In the case where there are two evils , the lesser evil can be committed in order to prevent the greater evil from occurring. In other words, it is choosing the lesser of two evils or between two harmful things.
- Examples:
  - Imprisonment of a father if he refuses to support his children.
  - Hudud for murder/ theft

RELATED MAXIMS

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- الضرر يدفع بقدر الإمكان
- Harm must be prevented wherever possible (Art 31)
- All necessary measures must be taken to prevent any harm from happening.

APPLICATION

- The validation of the option of defect "khiyar al-'ayb" in Islamic law to protect the buyer against harm. Thus, when A buys a car and then discovers that it has defects, he has the option to revoke the contract.
- If the period of leasing an agricultural land ends before harvesting the crops, the land should remain in the hand of the lease holder with the payment of proportionate rent until the harvesting is completed. This is allowed in Islamic law, so as to avoid harm to the leaseholder for cutting the crops before its appropriate time.
- Fasakh nikah due to physical abuse (the husband does not intend to educate the wife with the act)

APPLICATION

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- If anyone sells anything that could rot quickly, such as fruits, and the buyer disappears before the payment of the price and before receiving the sold items, the seller in this case is allowed to revoke the sale contract and sell the said item to another person, if he fears that the sold item will be spoiled. This is to prevent loss to the seller which will harm his business.
- Driving recklessly or beyond the stipulated speed limit on the highway which might lead to an accident is prohibited in Islam as it will cause harm to individuals and their property. Similarly a person is obliged to adhere to traffic rules and regulations in order to prevent harm.

POINT TO PONDER

- Which maxim can be applied in these situation?
  - A person forced to drink wine. If he doesn't drink he will be killed.
  - Suicide bomber
  - Sealed/ closed an area to prevent the spread of disease

END OF CHAPTER

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QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

THE PRINCIPLES OF CUSTOMS

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- APPLICATION
- INFLUENCE OF ‘URUF IN ISLAMIC JURISPRUDENCE
- CONDITIONS OF VALID ‘URUF
- CLASSIFICATION OF ‘URUF
- ROLES OF ‘URUF
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Custom is authoritative (Art 36)

INTRODUCTION

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- Custom plays an important role in the development of Islamic law.
- One of the feature of Islamic law is that some of its ruling can change according to the changes of circumstances, i.e. place, time, custom and the behavior of people.
- This is why it is possible for this law to be practiced at any time and place.
- However, there are some laws, which were fixed and cannot be changed. These are held to be immutable and suitable to be implemented at all times.

DEFINITION

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- Literally:
  - To know
- Technically:
  - Recurring practices which are acceptable to people of sound nature
  - Some practice which are practiced by some people or a society and they become accustomed to doing it

DEFINITION

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- Various definitions of ‘urf have been given by Muslim jurists. According to:
  - Khallaf : What is established and practiced by people from their sayings and doings, or not doing.
  - Badran : What is established and common in a group of people (jumhur) from their sayings and doings, and is consistently repeated until it influences them and is therefore accepted by their reason. He further noted that not all that is established and common can be considered as ‘urf, but it is that which is established and common to the people with wise reason and sound behaviour.
  - Zarqa’ : The behaviour of a group of people in their sayings or doings

MEANING

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- The definitions indicate that in order for ‘urf to be valid (as a hukm) it must be consistent with the practice of a group of people. Accordingly the practice of an individual is not an ‘urf but a personal habit (‘adah fardiyyah).
- Uruf = adah: known recurring practices (words/action)acceptable by people of sound nature/mind.
- Custom plays an important role in the growth of Islamic law. Although, it is not recognized as a major source of the law, but it can be relied upon in matters where the Shara’ did not give the exact details.

AUTHORITY OF 'URUF

- 'Adah/custom have the authority & can
  - specify a general matter (takhsis al-'amm) or;
  - restrict an unrestricted matter (taqyid al-mutlaq).
- Example:
  - If a contract does not specify whether the delivery of the goods is the responsibility of the purchaser or retailer, the prevailing custom (normal practice) should be depended upon to specify & clarify the matter which is not cited in the contract.

AUTHORITY OF 'URUF

- Therefore, if there arises any dispute among the people in a particular transaction, the normal practice in that particular transaction should be the arbitrator to resolve the dispute.
- However, if the custom contradicts a stipulated agreement between the parties involved, it (custom) is nullified.
- The agreement should prevail & not the practice because the statement or condition which is agreed on in the contract has greater authority over the customary practice of the people.

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- Before Islam, the traditions and customs were the basis of the Arab's life, including their religion, morality trade and transactions.
- With the rise of Islam, custom was diminished in importance.
- 'Uruf or adat is considered as having impact in the formation of Islamic law.

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1. A number of texts, particularly of the traditions were based upon custom and usages.
   - Example: the principle of blood money or diyah - is based upon customs.
2. The part of the sunnah based upon the tacit approval of the Prophet comprises many of the Arab customs
   - Example: the Prophet was silent in a number of commendable customs based upon the Prophet's Sunnah.
3. The customary of citizen of Madinah was regarded as a sufficient concencus of opinion
   - Example: Maliki school of thought accepted practice of Madinah people in the absence of an explicit text.

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- According to Imam Malik the customary conduct of the citizens of medinah (amal ahli madinah) is accepted as source of law in the absence of an explicit text. The conducts of the citizens of medinah was in most cases based upon customs and usages which had prevailed in that city.
- When the Arabs in their conquest were introduced to customs unknown to them which were not in conflict with any nass of shariah , such customs accepted in the shariah by means of consensus of jurists.
  - Example: Istihsan (Juristic Preference).

CLASSIFICATION OF 'URF

- The Verbal (Qawli) and Practical ('Amali) 'Urf.
- The General ('Amm) and Particular (Khass) 'Urf.
- The Valid(Sahih) and Invalid (Fasid) 'Urf.

VERBAL (QAWLI) & PRACTICAL ('AMALI) 'URF

Verbal 'Urf

- Consists of the general agreement of the people on the usage and meaning of words for purposes other than their literal meaning.
- Example: The word solah – literally means al-du'a or request. However it has been used in the Quran to describe the obligatory prayers of Muslims, and this second usage eventually become predominant. E.g walad, lahma etc

Practical 'Urf

- Consists of commonly recurrent practices of the people in daily life
- Example: Taking vacations on certain days and civil transactions like bay' al-ta'ati etc.

GENERAL ('AMM) & PARTICULAR (KHASS) 'URF

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General 'Urf

- Common custom which is prevalent everywhere among all people regardless of time.
- Example: The contract of istisna' (the order for the manufacture of goods at an agreed price) which is a necessity and is commonly practiced everywhere.
- Or the word nazar is known generally for something compulsory or wajib) to do.

Particular 'Urf

- 'Urf which is prevalent in a particular locality, profession or trade.
- This type of 'urf is accepted by the people in a particular place and not in all places.
- Example: Malaysians enter homes leaving shoues outside their homes but Jordanians don't.

VALID(SAHIH) AND INVALID (FASID) 'URF

Valid 'Urf

- 'Urf which does not contradict the Shari'ah or deny the interest of people and at the same time does not bring corruption.

Invalid 'Urf

- Aainst the principle of Shari'ah or it denies the interest of people or it brings corruptions.
- Example: The practice of usury or riba in transactions. Although it is common among many people it is against Shari'ah therefore such transactions are invalid and must be avoided.

CONDITIONS OF VALID 'URF

1. Reasonable and acceptable to the people with wise reason and sound behavior,
2. Common and frequent recurrence - it must be practiced by people commonly and frequently regardless of location.
3. The custom must be in existence at the time of the transaction, not an extinct customary practice or a later custom.
   - Example: the price of an item accords to the present currency known by both parties even if it not mentioned.
4. Does not contradict the text (whether nass Quran or sunah, agreed contract)
   - Example: the practice of riba in transaction - although it is widely practiced, it has no legal validity.
   - Example: a person cannot breach an agreed contract

EVIDENCES

- QURAN
  - "Keep to forgiveness, enjoin urf and turn away from the ignorant" (al-A'raf :199)
  - Many mufassirun suggested that the meaning of 'urf in this verse is synonymous to ma'ruf which means anything that is good. Therefore the custom of people shall be considered in making legal judgment.
  - Al-Quran also has considered some of the 'urf of the early Arab community as a legal basis in its law. For instance the principle of diyat, which was practiced in the early community, has been approved by the Quran.

EVIDENCES

- HADITH
  - Reported by 'Aishah r.a: "Hind, the daughter of 'Utbah, wife of Abu Sufyan, came to Allah's Messenger and said "Abu Sufyan is a miserly person. He does not give adequate maintenance for me and my children, but if I take from his wealth (some part of it), without his knowledge. Is there any sin for me?" thereupon, Prophet (SAW) said, "take from his property what is customary which may suffice you and your children".
  - Some commentators of Sunnah suggested that this hadith indicates the important role of custom and it should be relied upon in matters where Shara' did not give exact details.

EVIDENCES

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- Saying of 'Abdullah b. Mas'ud: "what the Muslims deem to be good is good in the sight of Allah".
- The proof that can be deducted from this quotation is that custom, if not against Islamic teachings, is normally considered as good practice to the Muslims and acceptable by people and reason.
- Therefore, such practice is accepted by Allah. So, it can be regarded as a source of law in Islam.

ROLES OF 'URUF

- Referring to the above sources,
  - earlier and more recent scholars of Islamic law have agreed that custom is an important source of Islamic law.
  - They have not objected to the role of custom in solving the problem that arise in Islamic law.
  - Imam Malik bin Anas for instance has considered the practice of Madinah people ('amal ahl al-Madinah) as a source of Islamic law.
  - Similarly, Al-Syafii has made many ijtihad on issues that arose when he was in Iraq, but when he moved to Egypt he changed some of his earlier opinions because of the different circumstances and customs in Egypt.
- This is obvious in the past and present literature of fiqh in which custom has been utilized by the jurists to solve many issues of fiqh.

RELATED MAXIMS

- لا ينكر تغير الأحكام بتغير الأزمان
- It cannot be denied that with a change of times the requirements of the law changes (Art 39)
- Example:
  - It is permitted in our time to shut the door of the mosque, when it is not prayer time to avoid theft
  - Offer and acceptance in electronic based contract (ATM, internet banking etc)

RELATED MAXIMS

- المعروف عرفا كالمشروط شرطا
- A thing known by common usage is like a stipulation, which has been made (Art 43)
- Meaning:
  - The custom must be accepted by people or society
- Example:
  - In manufacture of cloth, as a custom,ncustimer will give cloth and size of body to tailor. Subsequently, tailor will make clothes to customer without give any item

RELATED MAXIMS

- المعروف بين التجار كالمشروط بينهم
- A thing known amongst merchants is a though fixed by a stipulation between them (Art 44)
- Example:
  - If a merchant sold a commodity to a purchaser without agreement as to the time or a manner of payment and it was customary for merchant to obtain the price by weekly installment then the contract of sale should be interpreted according to particular customs

RELATED MAXIMS

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- التعيين بالعرف كالتعيين بالنص
- A matter establish by custom is like a matter established by a legal text (Art 45)
- Example:
  - A contract of sale using local currencies

RELATED MAXIMS

- اذما تعتبر العادة اذا اضطردت أو غلبت
- Effect is only given to custom where it is regular occurrence or when universally prevalent
- Meaning:
  - Custom is regular happen as well as not against by shariah. Activity that have been detemined in the Quran or hadith cant be called customs like solat, hajj, fasting etc.
- Customs is easy to accept in people and recurring practices by people
- Example:
  - Read Yaseen on Friday night

APPLICATION

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- The practice of people of certain places to divide dowry in marriage contract into two type. The first is the dowry paid when the contract is concluded and second is the dowry paid at a later period of time
- The custom that involves transactions is the sale of offering and accepting or bay al-ta'ati, which is normally concluded without the utterance of offer and acceptance
- The customary images of certain words among certain group of people such as the usage of the word "doctor". In universities normally this title refers to a person who hold a Ph.D degree but among a common person this word normally refers to a medical practitioner

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QAWAID FIQHIYYAH

ISLAMIC LEGAL MAXIMS

QAWAID FURU'IYAH (ADDITIONAL MAXIMS)

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CONTENT

1. Iza ijtama'a al halal wa al haram ghuliba al haram
   - (When halal and haram conflict, preference is given to haram)
2. Ma la yatimu al-wajibu illa bihi fahuwa wajib
   - (When a compulsory cannot be done without a thing, it is become compulsory)
3. Al-Ijtihadu la yanqudhu bi al-ijtihad
   - (One legal ruling does not destroy another)
4. Ma harama akhzahu harama a'thauhu
   - (When it is forbidden to take a thing, it is forbidden to give it)
5. When a thing becomes void, the things contained in it also become void" (Art 52)
6. "Management of citizens' affair is dependent upon public welfare" (Art 58)
7. "Correspondence resembles conversation" (Art 69)

MAXIMS 1

- "When halal and haram conflict, preference is given to haram"
- Meaning:
  - Islamic stance is very clear that halal is bayyin (clear) and haram is also bayyin (clear); anything in between is syubhah (doubtful) and syubhah is very close to haram (excerpt from hadith of the prophet).
- Hence, when we are facing the conflict between the two, the prefernce is haram and should be avoided.
- Examples:
  - Doubtful over the status of food;
  - The status of silk-clothing/suasa to male;
  - Nikah status etc.

MAXIMS 2

- "When a compulsory cannot be done without a thing, it is then becomes compulsory"
- Meaning:
  - The pre-requisite of anything that is wajib will become wajib.
- Example
  - The ruling of wudhu' is sunat but it become wajib to perform solat
  - Fardhu kifayah matters become compulsory with the absence of the matters
  - Dakwah become compulsory so long as Islamic state is not established.

MAXIMS 3

- "One legal ruling does not destroy another"
- Meaning:
  - The ruling made by a mujtahid shall not be abandoned or destroyed by the other mujtahid.
- Example
  - If one is certain about the direction of qiblah, he shall continue his solat - no need to redo

MAXIMS 4

- "When it is forbidden to take a thing, it is forbidden to give it"
- Meaning:
  - Anything derived from haram sources can't be used for any lawful purposes.
- Example:
  - Income or earnings from riba, zina, gambling, corruption and as such can't be used for any ibadah i.e. sadaqah, zakat, performing hajj, performing solat, giving nafqah etc.

MAXIMS 5

- "When a thing becomes void, the things contained in it also become void" (Art 52)
- Meaning:
  - The substance/effect of a contract will be nullified with the nullification of the contract.
- Example:
  - The benefit of insurance coverage is terminated with the surrender of the policy;
  - The right of nafqah for a wife is terminated with the divorce.

MAXIMS 6

- "Management of citizens' affair is dependent upon public welfare" (Art 58)
- Meaning:
  - The policy of the ruling government must uphold the welfare and justice of the whole society, not causing harm or danger to the nation as a whole.
- Example:
  - Periodical review on utility tariff i.e. electric; the increase in toll concession charges; the purchase of defense weaponry etc

MAXIMS 7

- "Correspondence resembles conversation" (Art 69)
- Meaning:
  - Anything done in writing has similar effect with speech-both have equal status.
- Example:
  - Signing of S & P as a prove of mutual consent in the purchase of an asset;
  - The utterance of talaq via text message or letter or e-mail etc has the same effect as talaq utterance by the husband.

END OF CHAPTER